

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

HURON MOUNTAIN CLUB,

Plaintiff,

v.

File No. 2:12-CV-197

UNITED STATES ARMY CORPS OF
ENGINEERS, LIEUTENANT COLONEL
MICHAEL C. DEROSIER, District
Commander, Detroit District,
U.S. Army Corps of Engineers,
UNITED STATES DEPARTMENT OF THE
INTERIOR, KEN SALAZAR, Secretary
of the United States Department
of the Interior, UNITED STATES
FISH AND WILDLIFE SERVICE,
DANIEL M. ASHE, Director of the
United States Fish and Wildlife
Service, and KENNECOTT EAGLE
MINERALS COMPANY,

Defendants.

Oral Argument re:
Plaintiff's Motion for Preliminary Injunction

Before

THE HONORABLE ROBERT HOLMES BELL
United States District Judge
June 6, 2012

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

APPEARANCES

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Grand Rapids, Michigan

June 6, 2012

1:00 p.m.

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P R O C E E D I N G S

THE COURT: You may be seated. Good afternoon.

This is the matter of our docket number 2:12-CV-197, Huron Mountain Club v. U.S. Army Corps of Engineers, Department of Interior, U.S. Fish and Wildlife, and Kennecott Eagle Minerals Corporation. I believe Mr. Addison is here on behalf of the plaintiffs?

MR. ADDISON: Yes, Your Honor.

THE COURT: Okay. And Mr. Rosen is here on behalf of the three government entities; is that correct?

MR. ROSEN: That's correct, Your Honor.

THE COURT: And you have Mr. Marinelli, Ms. Almassian here? Yes, there you are, okay. And Gary Segrest, you're here?

MR. SEGREST: Yes, Your Honor.

THE COURT: Okay. And Kennecott has Mr. Ettinger?

MR. ETTINGER: Yes, Your Honor.

THE COURT: Okay. Mr. Predko?

MR. PREDKO: Yes, Your Honor.

1 THE COURT: You've got the full contingent here.

2 Mr. Donohue?

3 MR. DONOHUE: Yes, Your Honor.

4 THE COURT: All right. And Mr. Watson?

5 MR. WATSON: Yes, Your Honor.

6 THE COURT: Wow. All right. And you are?

7 MS. DYKSTRA: Nicole Dykstra, Your Honor.

8 THE COURT: You're counsel or --

9 MR. ETTINGER: She's assisting with the technology,
10 Your Honor.

11 THE COURT: Oh, okay. Normally they don't sit right
12 at the table.

13 This is the plaintiff's motion for injunctive
14 relief. The plaintiff must clearly establish according to the
15 law here the likelihood of success on the merits in this case.

16 The Court has reviewed the briefing that has come in
17 the last couple days and has the benefit of reviewing a
18 considerable amount of documentation that apparently was
19 generated as part of the state factors, state litigation that
20 has been ongoing in this matter. This matter was filed
21 approximately a month ago on May 7th, and apparently it's my
22 understanding there will be no testimony offered today
23 substantively. Is that right, Mr. Knight (sic)?

24 MR. ADDISON: That's right, Your Honor. The parties
25 agreed that we would hear this on the record.

1 THE COURT: Very well.

2 MR. ADDISON: And the papers.

3 THE COURT: Okay. Mr. Rosen, that's agreeable with
4 you?

5 MR. ROSEN: Yes, it is, Your Honor.

6 THE COURT: Mr. Ettinger?

7 MR. ETTINGER: Yes, Your Honor.

8 THE COURT: All right. You may proceed, then, Mr.
9 Addison.

10 MR. ADDISON: May it please the Court, Rick Addison
11 and hopefully soon Nolan Knight will be here on behalf of the
12 plaintiff, Huron Mountain Club, Munsch Hardt firm, Dallas,
13 Texas. We appreciate the opportunity to appear in the Western
14 District and be admitted to it.

15 Section 10 of the Rivers and Harbors Act
16 specifically requires a rivers and harbors permit if a party
17 is going to excavate, fill, or in any manner alter or modify
18 the course, location, condition, or capacity of any lake or
19 the channel of any navigable water of the U.S. unless
20 recommended by the Chief of Engineers and the Secretary of
21 War. Really here we have not one, but two water -- navigable
22 waters under the Rivers and Harbors Act that will be affected
23 by the defendants' conduct, and those two are the Salmon Trout
24 River and Lake Superior.

25 In looking at the issue, our lawsuit begins with a

1 suit under the APA, and I think this Court has handled at
2 least a couple of those and is familiar with the fact --

3 THE COURT: Lots of them.

4 MR. ADDISON: Or many of them.

5 THE COURT: Many of them.

6 MR. ADDISON: And is familiar with the fact that an
7 APA challenge can be brought --

8 THE COURT: I've been here 25 years as a federal
9 judge, before that as a state judge, and I'm very familiar
10 with the Upper Peninsula. Never been to the Huron Mountain
11 Club, but I'm very familiar with the Upper Peninsula, having
12 not only a summer home there, but having done a lot of
13 litigation up there. In fact, there was a time I was the only
14 Article III judge going to the U.P., so I know your geography
15 up there.

16 MR. ADDISON: Great. And as the Court's also aware,
17 I think, because it's heard APA cases, it's not uncommon for a
18 plaintiff to complain about the federal government under the
19 APA when they make a decision that constitutes final agency
20 action. And under that statute, of course, final agency
21 action in 5 U.S.C. 551(13) is defined to not only be
22 affirmative acts, but the decision to take no action. So we
23 would start by saying I guess in the analysis, Has there been
24 final agency act in this case?

25 THE COURT: Well, what is the plaintiff's

1 jurisdiction to bring suit against an entity of the government
2 that has as its responsibility under Section 10 granting or
3 denying permits? What is your standing? I mean, you say the
4 Court has the innate authority and innate powers and all that,
5 but what is your specific authority here?

6 MR. ADDISON: To sue the government or to enjoin
7 Kennecott, Your Honor? I apologize.

8 THE COURT: To sue -- to sue the government for the
9 government's inaction.

10 MR. ADDISON: All right. Thank you, Your Honor.

11 Two points. Number one, under the Administrative
12 Procedures Act, agency action includes inaction. If the
13 federal defendants have a mandatory duty to administer the RHA
14 program as we say they have, then they have violated that duty
15 by not performing it if we're correct by requiring that the
16 applicant, who would be the applicant Kennecott, submit to the
17 permitting program.

18 THE COURT: Well, why are we having this discussion
19 in mid-2012 when as I recall this matter has been before the
20 state since 2006 and there was notice given to the entire
21 Upper Peninsula community via advocacy for and against sulfide
22 mining for years? Why are we only lately coming before the
23 federal court?

24 MR. ADDISON: Well, I'm going to answer that two
25 ways.

1 THE COURT: You have to answer a lot of ways.

2 MR. ADDISON: Maybe more than two ways, yes, Your
3 Honor. One of them is with respect to this claim, I was
4 retained in March and --

5 THE COURT: Oh, yeah.

6 MR. ADDISON: -- we brought it in May. Number two,
7 the issue the Court raises sort of bears on the topic of
8 laches and whether or not we brought it soon enough, and there
9 are several points I would mention in connection with that.
10 Number one, this is a no-permit case. A no-permit case is a
11 violation of the law every day that construction occurs
12 without a permit, so laches doesn't run. The statute of
13 limitations doesn't run.

14 Number two, with respect to the mine, the evidence
15 we submitted to the Court indicates that they didn't go
16 underground until September of 2011. Just as they argue, just
17 as Kennecott argues in its pleadings, they allude to laches
18 and they also raise ripeness. We would have a ripeness issue
19 until they either begin violating our procedural rights or
20 they begin the process of construction underground. That
21 occurred some seven months ago.

22 In addition to that, Your Honor, despite the fact
23 that it's been four, five, six years, there's a general
24 disfavoring of the laches defense that the Sixth Circuit has
25 noted on numerous occasions because even if a party is tardy

1 in bringing their lawsuit, when it's an environmental lawsuit
2 of this type the public has an interest, and therefore, laches
3 is rarely applied.

4 THE COURT: Didn't your client participate in the
5 state litigation?

6 MR. ADDISON: Fully, in the mining permit
7 litigation, yes, Your Honor.

8 THE COURT: The longest, I believe, administrative
9 hearing ever held in the state of Michigan. Your client was
10 part of that?

11 MR. ADDISON: They were. Yes, they were, Your
12 Honor.

13 THE COURT: And your client was offering up the same
14 positions that it's offering up now?

15 MR. ADDISON: I'm not sure about that, candidly,
16 Your Honor, of course, because all of these causes of
17 action --

18 THE COURT: Well, I say positions.

19 MR. ADDISON: Substantive positions?

20 THE COURT: Right.

21 MR. ADDISON: I think we did offer up the
22 substantive positions in trying to demonstrate various aspects
23 of impacts from this facility, but they certainly weren't
24 translated into federal causes of action. They were in the
25 context of the mining permit hearing only.

1 And I would note also, of course, Your Honor,
2 there's quite a bit of law all over the country that would
3 stand for the proposition that proceeding in a state
4 administrative agency is not a substitute for causes of action
5 where federal courts have exclusive jurisdiction. So while my
6 clients definitely knew some of the substantive issues
7 involving impacts on the river, endangered species and the
8 like, we would submit to the Court that we're not late to the
9 point of laches.

10 THE COURT: But you don't have exclusive -- but the
11 federal government doesn't have exclusive jurisdiction.

12 MR. ADDISON: Well, in the Clean Water Act, NEPA,
13 ESA --

14 THE COURT: Hasn't the Clean Water Act in Michigan
15 been undertaken by the state?

16 MR. ADDISON: Well, under 1344(g) and (h) there's
17 been a delegation to the state of all waters other than the
18 navigable waters because the statute only allows a delegation
19 of basically intrastate non-navigable waters. Here we're
20 arguing that we have a navigable water under both RHA and a
21 water of the U.S. under the Clean Water Act.

22 Now, in connection with that, Your Honor, I'm sure
23 as this Court's aware, since Sierra Club v. Hodel it has been
24 common that an APA action can be brought even where there's no
25 private right of action under the underlying statute. With

1 respect to the Corps' mandatory duty that we say they failed
2 to perform either because they did not act or because as the
3 affidavit of the defendants -- or rather, the declaration of
4 the defendants that was submitted as a part of this case
5 demonstrates, in September 2005 the U.S. EPA and the Corps had
6 a conference call, and in that call they decided not to take
7 action according to the affidavit. That is final action under
8 the APA, gives us jurisdiction to bring this lawsuit. Whether
9 they did it by inaction or by their decision to take no action
10 is a distinction without a difference.

11 With respect to the RHA claims, Your Honor, the
12 mandatory duty is set forth in the statute, and it's even more
13 clearly set forth in the Corps' own regs. At 33 C.F.R.
14 322.3(c) the Corps states: "Congress has delegated to the
15 Secretary of the Army in Section 10 of the RHA the duty to
16 authorize or prohibit certain work or structures in navigable
17 waters of the U.S. upon recommendation of the Chief of
18 Engineers."

19 Now, there are other sections that also describe
20 that mandatory duty as required and the like, and some
21 examples of those, 33 C.F.R. 322.1, special regs to be
22 followed in connection with the RHA: "A DA" -- Department of
23 the Army -- "permit will also be required for structures
24 and/or work affecting navigable waters under 33 C.F.R.
25 322.3(a). If an activity is not exempt, an individual Section

1 10 permit is required." And then in addition to that, 33
2 C.F.R. 322.5: "Department Army permits are required for
3 structures or work in or affecting navigable waters of the
4 U.S." So we would suggest to the Court, number one, APA suit
5 properly brought, appropriately brought, can bring it whether
6 there's a private right of action or not, and I might add the
7 entire NEPA body of case law is involving a statute where
8 there's no private right of action in the underlying statute
9 of NEPA.

10 So you get to the next point: Is there a mandatory
11 duty? The Corps and the statute establish the mandatory duty
12 that the Corps is overseeing and must administer this program,
13 and it is their duty to authorize or prohibit. They did
14 neither.

15 In addition to that, as the Court looks at the
16 issue, we'd also refer then to the Kirkland Masonry case, 614
17 F.2d 532 (534), Fifth Circuit, 1980, where an agency is
18 required to follow its own regulations. And in fact there is
19 a line of cases that says if an agency doesn't follow those
20 regulations, that a party has standing that affects their due
21 process rights.

22 Now, if there's a mandatory duty and if the
23 lawsuit's been properly brought, we then have to actually take
24 up, Judge, a couple of other issues. The first one is the
25 jurisdiction of the Corps, whether or not -- and we're talking

1 strictly now about the RHA, the Rivers and Harbors Act of
2 1899 -- whether or not there is a navigable water involved
3 with respect to the Salmon Trout River.

4 Now, the federal defendants have responded to our
5 claims that the Salmon Trout River is navigable by saying it's
6 only navigable two miles upstream from Lake Superior because
7 of some calculation of Lake Superior's interaction with the
8 Salmon Trout River. And while we agree those two miles are
9 navigable, there are several other tests that are used to
10 determine navigability of a water body, and they include
11 whether or not the water body has ever been used for
12 commercial purposes. And as the evidence we submitted both in
13 our latest filing last night or today and before demonstrates,
14 there was logging on the Salmon Trout River for a number of
15 years, and in fact in the state proceeding the Kennecott
16 lawyer specifically addressed that topic in an effort to show
17 the mining area wasn't pristine by presenting one of our
18 experts with a photograph that showed there was actually
19 mining at the site.

20 Evidence we put in also to the record, Your Honor,
21 as part of it demonstrates that that mining went back to
22 1880. We also showed there was a photograph -- I'm sorry,
23 mining, that logging went back to 1880. We also showed other
24 evidence of use of the Salmon Trout River, including
25 recreational and recreational commercial use. In the filing

1 we put forward last night, it amplified on that topic because
2 there's a map that's included that shows the put-in point for
3 this activity is at a place called County Road 550, which is
4 approximately a mile from the mine site.

5 So we argue that on those bases this river, the
6 Salmon Trout River, is navigable. In addition, in the Corps'
7 own regs when they talk about what intrastate bodies of water
8 are deemed navigable, one of the examples they give is a
9 tributary of the Great Lakes, and we would submit to the Court
10 the Salmon Trout River is a tributary of the Great Lakes.

11 Now, we can assume a number of different things,
12 Your Honor, but it's our position that the entire Salmon Trout
13 River is navigable either because of the tests that are set
14 forth in the regulations or because as a part of Section
15 329.11 it states that a body is navigable -- let me just get
16 that, Your Honor. A body of water is navigable and includes
17 all the land and waters below the ordinary high water mark.
18 Jurisdiction thus extends to the edge of all waterbodies, even
19 such waterbodies that may be extremely shallow or obstructed
20 by shoals, vegetation or other barriers. And then it
21 concludes by saying marshlands and similar areas are thus
22 considered navigable in law, but only so far as the area is
23 subject to the inundation of the ordinary high waters. That
24 same regulation, and this goes to the underground mine, says
25 Rivers and Harbors jurisdiction extends laterally to the

1 entire water surface and bed, and that includes all the lands
2 and water under it, below the ordinary high water mark.

3 So we argue as our initial position the Salmon Trout
4 River is navigable because it's used for recreational and
5 commercial traffic. It's navigable in that respect up to at
6 least County Road 550 approximately one mile from the site.
7 We also argue the headwaters, which are these wetlands that
8 are up above the mine, are also navigable waters under Section
9 403 because another of the proscriptions found in that statute
10 is that it is not lawful to build or commence the building of
11 any wharf, pier, or other structure in any port, roadstead,
12 haven, harbor, canal, navigable river, and then here's the key
13 phrase, or other water of the United States.

14 Even if the headwaters are not navigable by one of
15 those definitions, we would submit to the Court that they're
16 navigable as another water of the United States. Now, why?
17 The reason for that is, number one, they're one of the
18 marshlands included in that definition I just read. Number
19 two, and even more importantly, because the headwaters are the
20 source of the river, you cannot impact the headwaters without
21 impacting the river. Every bit of it. Their experts say as
22 much.

23 Now, talking about navigability a little bit more,
24 that's the position, and then the issue would become what
25 impact is happening to this river in its navigable area,

1 wherever we define that to be? Because if we don't have an
2 impact altering it, modifying it, or affecting it, then there
3 may be no cause of action in any event. So let's look at that
4 for just a moment.

5 Kennecott has some excellent consultants and one of
6 them is called Golder, and I happened to use them myself in
7 some cases in Pennsylvania, and they ran a number of studies
8 on what the drawdown is from these wetlands, and I want to
9 take just a half second to discuss that. What occurs when you
10 mine is we've got a river, we've got wetlands, we've got a
11 mine down here under it, and as you extract and remove rock
12 and other materials to create the mine and to extract the ore,
13 there's a drawdown of that water. Golder measured that
14 drawdown, and they came up with several different potential
15 scenarios: 60 gallons per minute, 75 gallons per minute, 80
16 gallons per minute, 210 gallons per minute. That drawdown is
17 actually measured as part of the groundwater, but it also has
18 that effect of drawing down from the wetlands.

19 They went to model that to see what its effect would
20 be. A guy named Council came in. He was supposed to perform
21 peer review. All he looked at was the impact from the 60
22 gallons per minute.

23 Now, let's talk about that impact. That impact he
24 concluded would reduce the flow of the Salmon River by 3.3
25 percent. Well, a 60-gallon-per-minute drawdown may equal 3.3

1 percent diminished flow in the river during some seasons, but
2 that 60 gallons per minute is going to be drawn down every
3 season of the year both when the river's running full from
4 snowmelt and when it's running shallow in the summer.

5 So that's going to be a -- that is an impact. That
6 does affect the capacity of it. The extent of that is for the
7 Corps to determine during the permitting. All we have to show
8 is an effect on the capacity. Also, the evidence shows this
9 activity's going to affect the temperature. That affects the
10 condition of that waterbody as well.

11 Second point which is also important. Though Golder
12 ran these numbers on the gallons per minute that would be
13 drawn down and the impact that would have on the Salmon Trout
14 River, they only did it for the 60 gallons per minute. And as
15 their witness Council testified, and this is all in the
16 materials we filed, he said, I wasn't hired to do a worst-case
17 scenario. I was hired to determine what the drawdown and the
18 effect would be if we operated the mine as it's supposed to
19 be.

20 Well, that's not the standard. Under the NEPA regs,
21 the Council of Environmental Quality, 40 C.F.R., the 1500
22 regs, you have to look at all impacts: indirect, direct,
23 potential. These impacts that would come from a greater
24 drawdown have never been studied. By way of example, though
25 the calculations may not be exactly linear, if we look at 210

1 gallons per minute and compare it to 60, that's 3.5 times
2 greater. If you multiply 3.5 times 3.3 percent, you get an
3 impact on the river of 11.55 percent rather than three, and
4 while we don't have to demonstrate anything other than that it
5 affects it, which it clearly does and they've admitted it,
6 it's important to know the scope of that impact.

7 Another important factor, they didn't study anything
8 downriver. They stopped studying after the wetlands around
9 the site and at the confluence of the west fork with the main
10 branch. So they have no data on what was affected anywhere
11 further downstream than that. They didn't run the model on
12 all the drawdown. They didn't run the model on a cone of
13 influence that would affect all of the area they were drawing
14 down from, and they come up with these figures that are not
15 representative of the potential impacts.

16 That is a violation of the Rivers and Harbors Act.
17 They are affecting a navigable water of the U.S. by changing
18 its capacity through excavation, and it doesn't matter if
19 they're in the river, next to the river, or on top of the
20 river. If it affects it, it's a violation, and that is our
21 initial position with respect to the RHA. In the Moretti
22 decision way long time ago in the Fifth Circuit, they declared
23 and determined that any work below the ordinary high water
24 mark without a permit is illegal, and the Court's jurisdiction
25 extends that far. Now, I might add why does the Court's --

1 I'm sorry, the Court's jurisdiction extends that far, the
2 Corps' jurisdiction extends that far.

3 There are a couple of other elements that also tell
4 us why the Corps' jurisdiction extends that far. Under 33
5 322.1, which is the section that is entitled Department of
6 Army Permits Required For Work, the last sentence of that says
7 if there's an underground structure or a tunnel that is under
8 a navigable water, a permit is required, and it's assumed to
9 affect capacity. Now, that issue will turn candidly on
10 whether or not this Court finds navigability all the way to
11 the headwaters because that's where the mine is under it. But
12 what it does demonstrate is despite the fact that they are 200
13 yards, 300 yards, 87 meters, whatever it is below the river,
14 there's still Corps jurisdiction. And by that definition I
15 mentioned to you in the Corps' regs that said the navigable
16 water extends from the water to the bed to all the land under
17 it, it includes the area where Kennecott is building its
18 mine. So we would suggest with respect to the RHA, Your
19 Honor, the Administrative Procedure Act's properly brought,
20 RHA violation because the defendant has admitted they are
21 affecting the capacity of this river.

22 Now, a couple of other points on that. They're
23 going to get up and say, Oh, we're going to stick some more
24 water in there. It's going to come out of our treatment,
25 storage, something, waterworks. And the fact of that matter

1 is that's just another change to the capacity. It doesn't
2 solve the earlier diminishment. It just injects different
3 analyses into what the next effect on the capacity will be.

4 Their lead witness, Mr. Council, was questioned
5 repeatedly on this, and he admitted that the water budget, the
6 water balance, if you will, between the surface water, the
7 groundwater, and the treatment water coming in was something
8 that they had very little confidence in, and the reason why is
9 they haven't measured all those effects. They haven't looked
10 at the right gallons-per-minute drawdown. They haven't
11 analyzed the effect of injecting more water as well as taking
12 other water out.

13 Third point we're going to hear from them, Oh, it
14 all gets washed out downstream and it doesn't matter. Well,
15 number one, they didn't study downstream, so they don't know
16 that. But --

17 THE COURT: Wasn't this all brought up at the state
18 hearing?

19 MR. ADDISON: Most of this evidence comes out of the
20 mining hearing, yes, Your Honor.

21 THE COURT: What did the administrative law judge do
22 with it?

23 MR. ADDISON: Well, they -- frankly, they ignored
24 it.

25 THE COURT: They screwed up?

1 MR. ADDISON: Well, that's certainly our position.

2 THE COURT: Yeah.

3 MR. ADDISON: Yeah, exactly, Your Honor.

4 THE COURT: Okay.

5 MR. ADDISON: But once again, respectfully, I don't
6 think that changes our cause of action here, we would suggest.

7 Now, also I might add these impacts weren't measured
8 because they didn't run the studies, so we don't know what's
9 going to happen downstream. We don't know what's going to
10 happen with all the wetlands.

11 Now, in addition to the RHA, Your Honor, we've also
12 brought an Endangered Species Act claim through the APA, and
13 of course under the Endangered Species Act the Fish and
14 Wildlife Service and the Corps in this instance have a duty
15 under Section 7 to engage in what's called a procedural
16 consultation. And that's a getting together and it's a more
17 informal process where they are required to determine whether
18 there are endangered species at the site and whether or not
19 those endangered species are going to be affected by the
20 project that is proposed.

21 In connection with that particular inquiry, and I'll
22 talk about the remaining portions of it, the witnesses for
23 Kennecott have testified to the following. They saw a great
24 gray owl's remains, Page 5413 of the transcript, at the site.
25 They have witnessed the spruce goose, another species that is

1 endangered or threatened, according to Page 5421 at the site.
2 The Kirtland's warblers, there were a handful of them
3 observed, 5437, at the site. And Kennecott's expert, Mr.
4 Tilton, admitted that the narrow-leaved gentian, which is also
5 an endangered species, but a plant, is present on the site in
6 the wetlands, Page 5486. Tilton also noted that there were
7 another couple of endangered species on-site, including the
8 narrow-leaved gentian we've discussed and the small-leaved or
9 yellow-ponded water lily.

10 Now, what does all that mean? Well, when there are
11 endangered species at the site and either they or their
12 habitat may be affected by a project, there is a mandatory
13 duty for the Corps to get together with Fish and Wildlife and
14 engage in this consultation. As a part of that consultation,
15 they have to and are supposed to determine whether or not,
16 one, there are endangered species present. Well, that's been
17 admitted. Number two, what are the effects? That hasn't been
18 determined because they didn't perform their duty. What are
19 the adverse effects to these species and will any of these
20 species be jeopardized? So --

21 THE COURT: That was not addressed below in the
22 state hearing?

23 MR. ADDISON: No, those issues, all of that
24 evidence, all of this evidence comes from the state hearing,
25 Your Honor.

1 THE COURT: But was it addressed?

2 MR. ADDISON: Well, they don't really address the
3 endangered species in a conclusion. They grant the permit and
4 give a bunch of grounds, but they basically wave that off, or
5 it wasn't emphasized.

6 THE COURT: Well, was a conclusion reached, it would
7 or it wouldn't?

8 MR. ADDISON: I don't think there was any conclusion
9 reached. Only the presence was noted because there was no
10 evidence to conclude that because the studies hadn't been run
11 and the government had not performed their task.

12 Now, once again, this is an APA claim at this point
13 against Fish and Wildlife and the Army Corps, not against
14 Kennecott, and it's to require them to engage in this
15 consultation. Now, once they find out through the procedural
16 consultation that there are endangered species at the site,
17 they then have to go to the next level, which is a biological
18 assessment and maybe a biological opinion because they have to
19 determine whether or not these activities will affect these
20 endangered species that are present.

21 Now, both of these laws -- oh, I might add also, and
22 this is important, the evidence is undisputed from Mr.
23 Brockman, Kennecott's witness, that the investigation that was
24 done at the state level, the EIA is what they call it,
25 environmental impact assessment, only addressed the 92 acres

1 of the site. Under federal law, under the Endangered Species
2 Act, under NEPA, they have to address the affected area, and
3 the affected area for an endangered species is not governed by
4 where the mine's built. It's governed by where it is found,
5 and we have endangered species found in this area, and the
6 affected area has not yet been determined. And so that is a
7 critical portion of the inadequate investigation that occurred
8 during the state process because they only looked at this
9 narrow truncated area. And that was Mr. Maki, rather, of the
10 DEQ who said the EIA was only 95 acres. And so that has not
11 been performed in any fashion and in any way.

12 Third law briefly, Your Honor, NEPA. When you have
13 major federal action, as this Court knows, NEPA is invoked.
14 When you have endangered species in the project area, that is
15 substantial federal action that requires a NEPA analysis, as
16 does a Rivers and Harbors permit. And I might add also with
17 respect to the Rivers and Harbors permit, Mr. Blake, one of
18 the DEQ representatives at the mining hearing, testified that
19 even though they were going to increase this area called the
20 crown pillar, which is the material that's left between the
21 riverbed and the top of excavation, he was still concerned,
22 even at that time when they increased it to 87.5 or something
23 meters, he was still concerned that the Salmon Trout River
24 might be totally destroyed at the headwaters because of either
25 stress fractures, faults, or horizontal pressures on the crown

1 pillar. His testimony was that needs to be studied. Well,
2 that did need to be studied and it should have been studied as
3 a part of the NEPA process in conjunction with the RHA permit
4 and the ESA requirements.

5 Now, as a part of that NEPA study, Judge, you know,
6 they have to go look at a variety of impacts, both water and
7 the like, and the real take-home point I think in this
8 instance, Judge, is --

9 THE COURT: Excuse me. It's "Your Honor" if you
10 want to refer to me.

11 MR. ADDISON: I apologize, Your Honor.

12 THE COURT: It's "Judge" if you're in front of an
13 administrative law judge, okay? Go ahead.

14 MR. ADDISON: Your Honor, the real take-home point
15 with respect to that is found in the NEPA regulations over at
16 40 C.F.R. 1506.1, and this gets to why Kennecott should be
17 enjoined and has to be enjoined. And the answer to that is
18 during the time the NEPA process is going on, that section
19 reads as follows: "Until an agency issues a record of
20 decision as provided in 1505.2, no action concerning a
21 proposal shall be taken which would, one, have an adverse
22 impact on the environment; or two, limit the choice of
23 alternatives."

24 Now, when you look at the case law on NEPA, we're
25 going to go back to when Justice Breyer was on the First

1 Circuit, and he wrote an opinion there called the Marsh
2 decision. And in the Marsh decision he says the reason this
3 NEPA provision is in effect is if you allow someone -- if
4 someone goes out there and builds without a permit without
5 waiting for the NEPA process, then they are doing what's
6 called steamrolling, and they reach a point where the
7 bureaucratic momentum and the money spent is difficult to
8 defeat, and he says that's something you have to take into
9 account because they're not allowed to do it.

10 THE COURT: But the question --

11 MR. ADDISON: Yes, sir.

12 THE COURT: The question still comes back to me --
13 maybe it's too practical. The question still comes back, you
14 were involved at the state level in this matter.

15 MR. ADDISON: My client was, yes, sir.

16 THE COURT: Your client was.

17 MR. ADDISON: Yes, sir. Yes, Your Honor.

18 THE COURT: Why didn't your client raise the flag
19 and start sprinting toward the federal courthouse at some
20 point?

21 MR. ADDISON: I'll try to answer that. They didn't
22 know and their lawyers didn't know.

23 THE COURT: Oh, come on.

24 MR. ADDISON: Well, then, Your Honor, let me posit
25 this question. We may be late, but we're the first ones to

1 the dance. The people who should know are sitting over at
2 this table.

3 THE COURT: No, that isn't --

4 MR. ADDISON: They didn't go apply for the permit.

5 THE COURT: No, that doesn't answer my question. My
6 question was if this grievous thing took place and NEPA
7 studies should have been going on and the agency should have
8 been enjoined, which is what you say now -- this is a
9 sophisticated plaintiff, no question about it -- why wasn't
10 this plaintiff screaming, Get the Army Corps of Engineers in?
11 Why wasn't this court, which has its doors unlocked Monday
12 through Friday, why wasn't this courthouse besieged?

13 MR. ADDISON: The only answer I can give you to
14 that, Your Honor, is that at least when I came to the dance,
15 they'd never heard this. And candidly --

16 THE COURT: Is there a reason why they might not
17 have heard this?

18 MR. ADDISON: Well, yes, there is.

19 THE COURT: Why is that?

20 MR. ADDISON: It's because we're underground here,
21 and it doesn't immediately occur to most people that building
22 something a hundred meters below a river is going to implicate
23 an obscure law from 1899 called the Rivers and Harbors Act.

24 THE COURT: But it concerned everyone enough that we
25 had 40,000 pages of transcript taken before an administrative

1 law judge. If it did that, then someone would have found the
2 federal courthouse. Believe me, people find the federal
3 courthouse in all kinds of ways. Why didn't they?

4 MR. ADDISON: I -- Your Honor, I don't know why they
5 didn't do it earlier. All I know is we found it when we did.

6 THE COURT: Yeah, yeah.

7 MR. ADDISON: And I know the Court -- that concerns
8 the Court.

9 THE COURT: It does. It does.

10 MR. ADDISON: But I think when it looks at the Sixth
11 Circuit law on it and it looks at the issues involving what
12 bars a claim, you're going to find out that our claim is not
13 barred by laches or any other doctrine because it's a federal
14 claim and the mining issues don't really directly raise it.

15 THE COURT: Could this have been a strategic
16 decision on your client's part? We'll try the state. If we
17 lose at the state, we'll start all over again with the
18 federal, and that will really end the whole mining project
19 because the mine would have run out of money. They couldn't
20 defend themselves after they've spent so much money and so
21 much time has gone by.

22 MR. ADDISON: I've got to say candidly to the Court
23 at least I haven't seen any of that, and everything that I
24 have seen indicates that people just didn't think of this
25 claim. And I realize there's a lot of testimony out there.

1 THE COURT: Yeah.

2 MR. ADDISON: But, you know, Judge, I've got -- Your
3 Honor, I apologize, I just have to come back to one other
4 point. The burden to get the permit is on the applicant. Are
5 we to believe with all the experts they had on water and the
6 like that they didn't discover they needed this permit? Are
7 we to believe that the Army Corps who commented on the
8 building of this new road and took up that issue didn't think
9 a permit was needed here? It just seems to me that while my
10 client --

11 THE COURT: Don't they have discretion?

12 MR. ADDISON: Pardon me?

13 THE COURT: There is some discretion given the
14 governmental authorities here, isn't there, as to what they
15 can issue permits for and what they can't?

16 MR. ADDISON: Well, I think there's some discretion
17 on how they issue permits, but there's no discretion on their
18 obligation to perform the mandatory duty of the process.

19 THE COURT: If they believe that they have
20 jurisdiction over it.

21 MR. ADDISON: If they believe they have
22 jurisdiction, that's right, Your Honor. And we quarrel on
23 that, no question about it. We disagree on that point.

24 THE COURT: If you quarrel on it, though --

25 MR. ADDISON: We disagree on that point, whether or

1 not it's navigable.

2 THE COURT: Excuse me. If you disagree, then what
3 am I to do, what's the Court to do with the government taking
4 one position and a litigant taking another position as to
5 whether or not the government has jurisdiction? What's the
6 law on that?

7 MR. ADDISON: The law on that, interestingly, Your
8 Honor, and we agree, is contained in a statement that's made
9 in the declaration by the Army Corps in this case, and it says
10 that despite whatever we say, we acknowledge that the
11 jurisdictional determination is to be made by the Judge. And
12 it's also in their regulations as well as their affidavit, and
13 the fact of the matter is, Your Honor, they've put forth one
14 of several tests they think establish jurisdiction and
15 navigability, and we've sought to satisfy several tests. They
16 claim jurisdictional waters only exist two miles inward, and
17 that's why we've put on the evidence of logging and the like,
18 to show how far jurisdiction does exist.

19 THE COURT: Aren't they entitled as a matter of law
20 to determine their own jurisdiction within that context?

21 MR. ADDISON: Well, no, Your Honor. Actually the
22 reg says that you are the person who determines that.

23 THE COURT: Well, but doesn't the Court give
24 deference to what they determine their jurisdiction is,
25 particularly where they have choices?

1 MR. ADDISON: Well, I agree with you there's a
2 deference rule that an agency is entitled to deference over
3 its interpretation of the environmental laws that it
4 oversees. But that doesn't go to the jurisdictional
5 determination because that's in the Court's hands according to
6 the criteria the Corps sets out, once again remembering
7 they've got to follow their own regs. These are -- all of
8 these positions, I might add, are either in their own
9 regulations or in the evidence that's been admitted by
10 Kennecott.

11 And so I think when the Court -- I appreciate its
12 concern about laches because we're sitting here six years
13 after part of this proceeding, and maybe seven. I think when
14 the Court looks at the law on that, it's going to see that
15 that's not really the determining factor. What the
16 determining factor is is whether the statute has run and
17 whether or not there's a continuing or daily violation.

18 THE COURT: Okay. I interrupted you. Excuse me.
19 Go back to NEPA.

20 MR. ADDISON: Yes, Your Honor.

21 THE COURT: Excuse me.

22 MR. ADDISON: I'm sorry. Did the Court want me to
23 go back to a point?

24 THE COURT: No, you were on NEPA and I interrupted
25 you.

1 MR. ADDISON: Oh, thank you, Your Honor. I believe
2 I was talking at one point about the Endangered Species Act,
3 and so we would submit to the Court mandatory duty under
4 Section 7 because of the presence, undisputed presence of
5 endangered species to engage in a Section 7 consultation.
6 That consultation if it was performed would show there are
7 endangered species at the site, which would give rise to a
8 biological assessment. That biological assessment would have
9 to determine that the endangered species or its habitat is
10 going to be affected or harmed because of both the drawdown to
11 its habitat and the potential harm during the nature of the
12 project, and none of that has been done. And so we would
13 suggest to the Court that it also has jurisdiction to enjoin
14 both Kennecott and require the Corps to perform those
15 mandatory duties under its responsibility and authority.

16 In addition to the points I've raised, Judge, there
17 are a couple of other -- Your Honor, there are a couple of
18 others that I'd like to touch on briefly. The defendants
19 raise a number of issues like laches that we have discussed
20 briefly, and I'd like to at least take a couple of those
21 others up.

22 Number one, you mentioned the state administrative
23 proceedings. There are a number of authorities we cite in
24 document number 4 at Page 20 that the state proceedings are
25 not a substitute for the federal action. With respect to NEPA

1 in particular, that EIA would never satisfy NEPA and can't act
2 as a substitute for it because it never took up the affected
3 area.

4 In the same manner all of these federal laws have
5 exclusive jurisdiction in federal court, and so none of our
6 rights are waived or lost through a state administrative
7 proceeding. In case the Court was wondering, agency inaction
8 under ESA is actionable through the APA, Bennett v. Spear, 520
9 U.S. 154 (1997).

10 I want to talk briefly about the relief against
11 Kennecott. We are not seeking APA relief against Kennecott.
12 When the Court looks at the various cases that address how
13 these issues are handled, it will see that in bringing an APA
14 claim, that claim is only against the federal government,
15 can't be brought against the state or the private entity. But
16 both the Sixth Circuit and other circuits have recognized that
17 through the All Writs Act or this Court's inherent powers, it
18 can enjoin the private party. And I might add the most recent
19 pronouncement of that comes in the Southwest Williamson County
20 matter out of the Sixth Circuit, 243 F.3d 270 at 277, where
21 they state: "If we conclude that the project constitutes
22 major federal action, then we have the authority to instruct
23 the District Court to enjoin the third party" -- Kennecott --
24 "from further construction."

25 Now, Kennecott argues that we should have brought a

1 Clean Water Act suit instead of an APA suit, and that's pretty
2 simple. We can't sue the government under the Clean Water Act
3 because, number one, the Corps is not violating an effluent
4 limitation under 1365(a)(1), and the suit against the federal
5 government under 1365(a)(2) can only be brought against the
6 administrator rather than the Corps. So we don't have another
7 remedy with respect to the Army Corps. The Army Corps remedy
8 is for their arbitrary and capricious acts not in accordance
9 with law.

10 Last couple of points I want to mention again, I
11 guess, Your Honor, because it obviously is of concern to the
12 Court is this issue of laches, and we would want to refer the
13 Court to 468 F.2d 1164 at 1182-83. The Sixth Circuit
14 addressed in Environmental Defense Fund v. Tennessee Valley
15 Authority the fact that laches is disfavored, rarely applied
16 because of the public interest involved in these environmental
17 lawsuits. In accordance with that is Sierra Club v. Pena, 915
18 F.Supp 1381 (1394) from the Northern District of Ohio in 1996.

19 Also, there's a strong presumption that plaintiff's
20 delay is reasonable so long as the relevant statute of
21 limitations has not elapsed. And as I mentioned to the Court
22 earlier, the reason the statute of limitations has not lapsed
23 is that it hasn't begun to run, and we have a variety of
24 failures that constitute not having a permit. It's not like
25 they had a permit and they thought they had the authority to

1 go forward. Laches may be more appropriate in that instance.
2 Here they have no permit. They have no authority. They
3 violate the law every day if we're correct, and therefore, the
4 statute of limitations hasn't run. They're violating the law
5 today and laches is not appropriate.

6 As the Court mentioned, there are four elements for
7 the test for injunctive relief. The first one is likelihood
8 of success on the merits. We think we've demonstrated for the
9 RHA that we're going to succeed on that claim because they
10 have affected the capacity, the condition of a water of the
11 U.S. and a navigable water.

12 We think we will -- we have demonstrated likelihood
13 of success under the ESA portion of the claim because they
14 have not engaged in the mandatory consultations and activities
15 required when there's an endangered species not just in the
16 area, but these witnesses testified on the mining site.

17 With respect to NEPA, they haven't even begun to
18 satisfy NEPA because they haven't been in the federal system.
19 The EIA they did in Michigan was truncated and inadequate. It
20 definitely does not satisfy the standards of 40 C.F.R. 1500.

21 I'm going to mention briefly the National Historic
22 Preservation Act also with respect to those claims, Your
23 Honor. As this Court I'm sure is well aware, there is a
24 native place of worship called Eagle Rock.

25 THE COURT: You contend in your pleadings here that

1 the defendant is going to blow it up.

2 MR. ADDISON: Well --

3 THE COURT: Where did that come from?

4 MR. ADDISON: Well, at one point in time -- maybe
5 not blow it up. At one point in time --

6 THE COURT: Those were your exact words.

7 MR. ADDISON: Well, they planned to enter through
8 the rock, through Eagle Rock itself, and I don't know the
9 status of their plans and I know they're tunneling from the
10 side. But in the press and other areas they have not yet said
11 that they're not going to affect Eagle Rock by destroying it.
12 But that's not the test. The test is what they're doing to it
13 now, and it's --

14 THE COURT: Well, but --

15 MR. ADDISON: Yes, sir.

16 THE COURT: You're an officer of the Court.

17 MR. ADDISON: Yes, sir.

18 THE COURT: When you tell me they're going to blow
19 it up, I look at it and I say, What in the world? I want to
20 hear more about that.

21 MR. ADDISON: Well, I would like to hear more about
22 it too and whether or not they --

23 THE COURT: No, you made that statement to me.

24 MR. ADDISON: And that statement has been made by
25 Kennecott, and my understanding, Your Honor, as an officer of

1 the Court is that's still a possibility. They may end up
2 blowing it up.

3 THE COURT: I will put them on the seat for that.

4 MR. ADDISON: Pardon me?

5 THE COURT: I will put them on the chair for that.

6 MR. ADDISON: Well, I would like to know the exact
7 answer to that, too, Your Honor, because it's cryptic.

8 THE COURT: Who said it? Where did they say it? I
9 can't believe anyone would say that.

10 MR. ADDISON: Well, they said it for an extended
11 period of time and then they changed part of their location.

12 THE COURT: That they were going to blow it up?

13 MR. ADDISON: Well, that they would destroy it or
14 they would have to enter the mine through there, blast through
15 it to get to the ore. I know they've changed that to some
16 extent, but I don't know exactly why, and the testimony at the
17 mining hearing seemed to indicate it had not yet been
18 determined that they would not do that. But if we learn they
19 are not doing that, then we will --

20 THE COURT: Yeah, but -- I'm going to be hard on
21 them too if they do the same thing. As an officer of the
22 Court, particularly in an abbreviated preliminary hearing,
23 you've got to lay it straight out to me. If they're going to
24 blow it up and you have evidence of it, I take what you say at
25 face value. I can't say, Well, that was just hyperbole, can

1 I?

2 MR. ADDISON: No, and I don't think it's hyperbole,
3 Your Honor. I think what we're going to find is that
4 possibility still exists and that's what we understand.

5 THE COURT: That they will blow it up?

6 MR. ADDISON: That they're going to at some point --
7 there's still the possibility they will enter through Eagle
8 Rock through blasting. That's what we understand. And if
9 that's wrong, then I will be corrected, but --

10 THE COURT: Who's they?

11 MR. ADDISON: Well, this is what we read in the
12 press, and that is what -- I'll also pull it out of the mining
13 hearing. But they don't say categorically that they will not
14 do that. And if they tell me that today, then that would be
15 new, Your Honor.

16 THE COURT: What did they say at the hearings?

17 MR. ADDISON: Well, at the hearings they address it
18 only cryptically.

19 THE COURT: Well, they were under oath when they
20 said, We have a fence around it, didn't they?

21 MR. ADDISON: Yeah, they said they had a fence.

22 THE COURT: And they allowed people to come and
23 worship there.

24 MR. ADDISON: Well, on a restricted basis they allow
25 people to come and worship there.

1 THE COURT: Well, I didn't say restricted. I just
2 said they allowed people to worship there. Isn't that what
3 they said?

4 MR. ADDISON: That's what they said at the hearing,
5 Your Honor.

6 THE COURT: Isn't that what's occurring? Do you
7 have any reason to believe that's not occurring? In these
8 preliminary injunction hearings you've got to be right square
9 with me.

10 MR. ADDISON: Well, I am, Your Honor. I'm not going
11 to be anything but square with you, and this is what we read
12 when we saw what they claimed to do in their application, in
13 their other materials where they say that's still -- they
14 haven't said that's not a possibility. That's all. That's
15 all I've heard of it.

16 THE COURT: I'll have fun with Mr. Ettinger on that
17 one.

18 MR. ADDISON: In addition to -- I want to go back to
19 Eagle Rock, Your Honor, because let's assume for purposes of
20 argument they're not blowing it up, and what they're doing is
21 they've surrounded it with a fence, and while they still let
22 people worship there in some way, they're still desecrating
23 that place of worship. If someone were to put a fence around
24 and restrict access to a church or a synagogue or a mosque and
25 that was a historical preservation or a historically

1 registered building, then they have to go investigate that,
2 and there's been no investigation of that. There's both the
3 tribe's historical preservation officer who would be involved
4 and the state's.

5 And so in reality, Judge, we will establish whether
6 or not it's going to be blasted or not still even though
7 they've said it's a possibility. But even if they don't blast
8 into it, they're required to engage in this process under the
9 National Historic Preservation Act.

10 The other three requirements for an injunction are,
11 of course, irreparable harm and that it is likely we will
12 suffer irrevocable harm, and of course we're suffering
13 irreparable harm now. If you look at the SWEPCO case, for
14 example, out of the Eighth Circuit, it addresses in some
15 detail what's known as procedural harm. And as an entity that
16 has standing, we're entitled to have the proper procedures
17 followed under these various laws, and if not, that's
18 procedural harm which courts have determined to be
19 irreparable.

20 In addition to that, environmental harm is generally
21 described as irreparable because it is so difficult to repair
22 if you can repair it at all, and so there is irreparable harm
23 occurring. It is occurring to my client at this time, and we
24 would suggest we've demonstrated that prong.

25 The balancing of harms we would suggest does not

1 favor Kennecott or the state. With respect to Kennecott, any
2 harm that they claim is self-inflicted, and the reason it's
3 self-inflicted is that they began construction without the
4 necessary permits.

5 THE COURT: But --

6 MR. ADDISON: Yes, sir.

7 THE COURT: They had the permits, didn't they, from
8 the state?

9 MR. ADDISON: Well, they -- they cer -- well, I
10 don't know whether they had the state permit when they began
11 construction, but --

12 THE COURT: That's what they alleged.

13 MR. ADDISON: They certainly didn't have the federal
14 permits that we're saying they had to have.

15 THE COURT: That's the question.

16 MR. ADDISON: Well, they didn't have all of them,
17 and they didn't have any of the federal ones. But in that
18 instance when the issue of harm has been analyzed, courts have
19 looked to see whether or not, like Judge Breyer raises, the
20 steamrolling issue and jump the gun. In the same way in
21 analyzing the harm issue, there's a question of whether or not
22 that harm was self-inflicted, and by self-inflicted they mean
23 you spent the money, but you didn't get the permit. And so in
24 balancing harms --

25 THE COURT: But can't you turn that around and say

1 Huron Mountain Club could have begun this lawsuit two or three
2 years ago, couldn't they?

3 MR. ADDISON: Yes, Your Honor.

4 THE COURT: Do they get to wait until the state is
5 all finished and do they get to wait until construction has
6 been, from their perspective, \$130 million worth of
7 construction has been undertaken, and then you file a
8 lawsuit?

9 MR. ADDISON: Yes, sir.

10 THE COURT: And then you say, Tough luck. Harm is
11 against you.

12 MR. ADDISON: Yes, sir. Yes, Your Honor.

13 THE COURT: How do I balance that?

14 MR. ADDISON: Pardon me?

15 THE COURT: How do I balance that?

16 MR. ADDISON: Well, once again, this is a no-permit
17 case, and if the Court finds they had to have these permits,
18 then the balance of harm way favors us because they have been
19 in construction without them.

20 THE COURT: What's the public interest here?

21 MR. ADDISON: Well, the public interest lies with
22 enforcing the environmental laws which the government should
23 be in favor of and us. Kennecott has no public interest.
24 They have a private interest. Their private interest is that
25 they'll make money off of this mine.

1 Now, they raised the issue of jobs and taxes and
2 those public types of issues, and we would suggest to the
3 Court, Your Honor, that those benefits, those interests of the
4 public are not harmed by making them get the permits. In
5 fact, they're enhanced, and they will be back to having jobs.
6 They will be back to having taxes that are paid once they get
7 the correct permits, and they can go ahead and complete their
8 mine if they can do that. But until that time the public
9 interest lies far with our side because of the nature of the
10 environmental laws and the public interest that's built into
11 those.

12 And once again, Kennecott's interest is private.
13 It's a private company for profit. I know they've assembled
14 these statements and affidavits from various members of the
15 public trying to generate a public interest, but that's not
16 Kennecott's interest, and that interest is not harmed by their
17 getting these permits or going through this process that says
18 you don't need a permit. Then they're back to construction.

19 And in answer to the Court's question a moment
20 before, even though we waited three years or six years, even
21 though they've spent all this money, that does not
22 counterbalance and outweigh the public interest in enforcing
23 the environmental laws and that pulls in the laches doctrine
24 again and the issue of whether we're timely. And I appreciate
25 again the fact that, you know, the Court's looking at me and

1 saying six years, five years, seven years, and I can't change
2 that. But I would respectfully direct the Court to these
3 authorities that explain why that doesn't bar our claim.

4 And then lastly -- we talked about public interest.
5 The last issue if we were to get to it would be relief. And
6 the appropriate relief in this case, Your Honor, is that
7 Kennecott be enjoined, and that after they're enjoined from
8 any further activity, this Court remand this matter to the
9 Army Corps for its proper permitting, its proper consultation,
10 its proper NEPA process.

11 In connection with that, if the Court saw fit to
12 enter an injunction, we would have to take up the issue
13 perhaps of a bond, and of course Rule 65(c) of the Federal
14 Rules of Civil Procedure, if you're seeking an injunction
15 through that rule, requires a bond. If this Court sees fit to
16 enter an injunction either based on its inherent powers or the
17 All Writs Act, no bond is required. If it's under Rule 65(c),
18 there are a number of doctrines that say any bond my clients
19 should have to post should be minimal, and the reasons for
20 that are, number one, they're an entity that is a nonprofit
21 organization under Section (7), 503(c)(7), and as a part of
22 their charter, which is also in evidence, they have committed
23 to the preservation and conservation of these areas that they
24 impact or own.

25 So there's a number of doctrines out there, but one

1 of them is that if you're a nonprofit and you're seeking to
2 preserve the environment or conserve it, then you should
3 either have a very small bond or no bond at all. There's also
4 the doctrine, of course, that a bond should not be so high
5 that it in essence prevents litigation of the case.

6 And so we would suggest to the Court that since
7 we're seeking the injunction not under 65, it's not
8 applicable, if a bond is to be posted, we would suggest it
9 should not be more than a -- maybe more than a nominal
10 amount. And then once again going into the bond analysis, we
11 would refer the Court to those cases that show that the harm
12 Kennecott might suffer, if any, would be self-inflicted and
13 we're not required to bond their self-inflicted harm.

14 I think, Your Honor, while I'd like the opportunity
15 to respond, that concludes my opening remarks.

16 THE COURT: Very well. You will have an opportunity
17 to respond.

18 Let's take a few-minute break and then we'll
19 proceed. Ready to proceed after we take a break? Okay. Very
20 well, Mr. Rosen.

21 (Proceedings recessed at 2:02 p.m.; reconvened at 2:17 p.m.)

22 THE COURT: You may proceed, Mr. Rosen.

23 MR. ROSEN: Thank you, Your Honor. And just to fill
24 out our team here, on the phone we have Laurel Bedig and Ethan
25 Eddy because this case involves a number of different statutes

1 and involves a number of different attorneys from the U.S.
2 Department of Justice, but I hopefully will be able to handle
3 it all for you.

4 THE COURT: Very well.

5 MR. ROSEN: But if you have specific questions, I
6 may refer to them.

7 I think there are two matters that are not in
8 dispute here based on what Mr. Addison has gone through on
9 this. One is that the three environmental review statutes are
10 wholly dependent and derivative on showing that there's some
11 permit requirement under either the Clean Water Act or the
12 Rivers and Harbors Act. And the second is that in order for
13 this Court to have jurisdiction over an APA claim, there must
14 be a mandatory duty for the Corps of Engineers to act to
15 either demand or require a Clean Water Act permit or demand or
16 require a Rivers and Harbors Act permit.

17 Let me start with the Clean Water Act first.
18 Section 404, which is the only section allegedly violated
19 according to the complaint, is a statute that deals just with
20 discharge of dredge and fill material into waters of the
21 United States. It allows one -- Section 301 of the Clean
22 Water Act prohibits any party from discharging any pollutant,
23 including dredge and fill material, into waters of the United
24 States and subjects that person to both civil penalties and
25 potential criminal penalties and injunctive relief if they

1 take such action absent a permit. Section 404 allows them to
2 go seek a permit from the Army Corps of Engineers.

3 That provision says that the Army Corps of Engineers
4 may issue a 404 permit. There's nothing in that provision
5 that requires the Army Corps of Engineers to issue a permit.
6 There's nothing in that provision that requires the Army Corps
7 of Engineers to go out and seek a permit from a party, to
8 demand that a party submit a permit. It is wholly within the
9 discretion of the actor of the project proponent to determine
10 on their own in their mind whether a permit is required to
11 avoid violating Section 301 of the Act, and they make that
12 determination at their own peril.

13 There is in fact -- again, the language of the
14 statute says only that the Corps may issue a permit. The
15 Administrative Procedure Act makes it very clear that it
16 simply does not cover discretionary acts of any federal
17 agency, and there is nothing mandatory about Section 404 which
18 requires the Corps to demand a permit.

19 In the end, what the plaintiffs are really doing is
20 seeking to have the Corps of Engineers enforce the penalty
21 provisions of the Clean Water Act. First of all, that is not
22 really even the position of the Army Corps of Engineers.
23 That's the position of the Environmental Protection Agency for
24 the most part, which is not even a defendant in this case.
25 That is a pure enforcement discretionary decision.

1 Both the determination of whether to even ask a
2 party to seek -- to require a permit or submit its own
3 application for a permit and a decision that a 301 violation
4 may have occurred, and therefore, action should be taken
5 either through a cease and desist order or the filing of a
6 civil action or the filing of a criminal action are all
7 quintessential discretionary actions which are not mandatory
8 duties. As both -- the SUWA case has made clear that 404 does
9 not cover discretionary actions, and the Heckler line of cases
10 of the Supreme Court has made clear that whatever the
11 circumstances, the Corps could even believe that there is a
12 violation occurring, it is still within the Corps' discretion,
13 and to be, you know, more accurate, within EPA's discretion to
14 make a determination whether to allocate its enforcement
15 resources to go after that party. So there is no mandatory
16 duty and therefore no jurisdiction under the APA for the Clean
17 Water Act case.

18 Beyond that there is the citizen suit provision
19 within the Clean Water Act which expressly says that if EPA
20 does not decide to bring an enforcement action, the party, in
21 this case Huron Mountain Club, can sue the party they believe
22 is the offending party, in this case Kennecott, for the exact
23 same violation they say is occurring here. The Clean Water
24 Act provision makes it very clear that if they believe a 301
25 violation is occurring, which means that they're depositing

1 dredge and fill material into waters of the United States
2 without a permit, they can bring their own direct action. In
3 fact, the cases we cited make clear that that only proves even
4 more that --

5 THE COURT: Want to pull that microphone over a
6 little closer?

7 MR. ROSEN: Oh, sorry. That only proves even more
8 that a private litigant cannot commandeer the federal
9 enforcement authority, but they can supplement it. If the EPA
10 or the Corps chooses not to pursue an action, then they can
11 supplement it.

12 Now, we don't get into the bases for the EPA or the
13 Corps' decision here. I submit that this may be one case
14 where it would be very easy to see why the EPA or Corps hasn't
15 done anything. It's been the subject of a massive amount of
16 analysis and review by state authorities, and you would say
17 that this is a pretty good case no matter what's going on out
18 there that you would not devote those types of resources when
19 this has already been reviewed there.

20 Beyond that, beyond the lack of any mandatory duty,
21 which is again absolutely required for an APA case, in this
22 case even if there was some mandatory duty, the Corps of
23 Engineers has no statutory ability to issue or demand a 404
24 permit in this case because Michigan is one of the two states
25 where the entire 404 program has been assumed by the State of

1 Michigan. And under Section 404(j), once that occurs, and it
2 occurred -- we submitted Mr. Konik's affidavit which laid out
3 the memorandum of agreements in 1983, in 1984, and 2011.
4 Under those agreements, once that is approved by EPA, which is
5 what was approved in 1983, the ability of the Corps to issue a
6 permit is suspended by statute. So they have no statutory
7 ability to even issue a permit here even if Kennecott came to
8 it. What they'd have to do is refer them to the state.

9 Finally, if we got beyond all those jurisdictional
10 defenses, and it's really impossible to get beyond those in
11 this case, we don't know a great deal about the facts of this
12 case. We only know what we read in the same types of
13 documents that you read because we haven't spent five or six
14 years with this case. But based just on the plaintiff's
15 allegations, there is no 404 violation here.

16 A 404 violation requires the discharge of dredge or
17 fill material into waters of the United States, which in this
18 case would generally be the Salmon Trout River, associated
19 wetlands, and any other similar waters. There's no allegation
20 in the complaint that that's going to occur. 404 applies to
21 the surface waters of the United States. Their entire case is
22 based on subsurface activity.

23 Now, they say that this may result in drawdowns of
24 the water in the river. It may affect certain other aspects
25 of the river. But none of that is a discharge of waters --

1 into surface waters of the United States. So it doesn't even
2 come within the ambit of a Section 404 permit even if the
3 Corps had jurisdiction in Michigan and even if it had a
4 mandatory duty to require that. And at least at this stage in
5 a preliminary injunction hearing where the plaintiffs have to
6 establish a high likelihood of success on the merits, if we
7 got past all those jurisdictional defenses, based on their own
8 pleadings it's pretty much impossible for them to have
9 established that in this case.

10 Turning to the second statute and the only other
11 basis to then kick in the environmental reviews is a permit
12 required under the Rivers and Harbors Act. Now, unlike the
13 Clean Water Act, which has very expansive jurisdiction in the
14 waters that it covers -- it covers lots of waters and even
15 wetlands connected to waters which may not be navigable on its
16 own. The Rivers and Harbors Act of 1899 has a very different
17 purpose, and as the cases we've cited from the Supreme Court
18 in our brief made clear, the term "navigability" is determined
19 differently for different statutes. The purpose of the
20 Rivers and Harbors Act was for the Corps to be allowed to keep
21 the channels of interstate commerce open.

22 Now, again, in order for the plaintiffs to have a
23 claim, there must be a mandatory duty under that statute for
24 the Corps to issue a permit. They cite Section 403. That's
25 what they rely on. The word "permit" doesn't even appear in

1 that statute. What that statute says is that a party cannot
2 place an obstruction in a navigable portion of a waterway,
3 what they call a Section 10 waterway under Section 10 of the
4 Rivers and Harbors Act, that interferes with the flow of
5 interstate commerce without approval of the Corps.

6 But once again, if they do not do that, they are
7 subject to enforcement by the Corps of Engineers, more
8 specifically in this case by the Attorney General of the
9 United States. If a violation occurs, for instance, if in a
10 navigable portion, let's say we all agree that the last two
11 miles of the Salmon Trout River is navigable, and a project
12 occurs where fill and dredge material is filled in there that
13 interferes with the navigable portions of that, there is still
14 no mandatory duty whatsoever for the Corps to demand that
15 party to obtain a permit. They may write a letter to them and
16 say, You know, we think you might be violating this statute
17 and you ought to get a permit. But there is no duty to
18 require a permit.

19 What happens is, just as under the Clean Water Act,
20 the federal government can use its enforcement procedures to
21 stop that, to seek fines. In fact, it's a criminal violation
22 under the Rivers and Harbors Act. It's a misdemeanor to
23 violate that act by putting fill and dredge material into the
24 navigable portion of the river. But again, there is no
25 obligation on the part of the Corps to require a permit. Just

1 like with the Clean Water Act, that's the obligation of the
2 individual defendant to determine whether they believe the act
3 is required and therefore make a determination at their own
4 risk whether they go forward with a permit or without a
5 permit.

6 Okay. Even beyond that --

7 THE COURT: But if they're -- if actions take place,
8 using this two-mile limit, which is I think it's part of the
9 agency determination, two miles of the Salmon River --

10 MR. ROSEN: Right.

11 THE COURT: If actions take place upriver which
12 determinatively affect the last two miles, for instance, of
13 this river, the Army Corps of Engineers would then become
14 involved, correct?

15 MR. ROSEN: Their jurisdiction is limited to the
16 navigable portions of the river, and if it's close enough
17 where it has some immediate and significant impact, it might
18 be possible that it might stretch beyond two miles. But as a
19 general matter --

20 THE COURT: But it has to come into the two miles is
21 what you're saying in order to be actionable?

22 MR. ROSEN: Absolutely. Absolutely.

23 THE COURT: Okay.

24 MR. ROSEN: Beyond that, now, let's assume we get
25 past the mandatory duty obligation, which again we can't get

1 past here because it is not in the statute, it's not in the
2 regulations, it's not anywhere, under the Rivers and Harbors
3 Act there's no private right of action. There's just no
4 private cause of action.

5 Congress has written a multitude of statutes on all
6 kinds of subjects, and many of them, if not most of them,
7 provide some rights because they're geared towards effecting
8 certain actions that affect certain parties. But there are a
9 core of actions where Congress just decided an agency is given
10 power, and even if they violate that power or make a mistake
11 under that authority --

12 THE COURT: Or abuse it.

13 MR. ROSEN: Or abuse it. Or abuse it, they are not
14 subject to a private right of action. And the cases that we
15 cited like the Sierra Club v. Corps of Engineers, an action
16 brought under the APA where the District Court found that they
17 thought the Corps made a mistake and that the action was
18 within the navigable waters and should be stopped, and the
19 Court of Appeals said, That may be the case, but as the
20 Supreme Court has made clear, there's simply no private right
21 of action under the Rivers and Harbors Act. So there is no
22 opportunity for the plaintiff to obtain redress on that.

23 Now, there is under the Clean Water Act. They can.
24 They can go directly against Kennecott under the citizen suit
25 provision. And we don't know why they haven't done that in

1 this case because I think Mr. Addison said something about the
2 effluent limitation. We've set out in our brief it's very
3 clear that the exact claim they're making here under the Clean
4 Water Act, dredge and fill material into waters of the United
5 States, that's a Clean Water Act violation, is subject to a
6 citizen suit claim. They can go directly against Kennecott.
7 We even gave an example of a recent case where an
8 environmental group sued a developer for discharging deposit
9 and fill into waters of the United States under the Clean
10 Water Act without a permit and they got an injunction against
11 the developer. That's their opportunity under that act.

12 Finally, I will address what Mr. Addison addressed
13 for a good portion of his discussion, which is that again,
14 even if you pass all of these jurisdictional hurdles, and you
15 don't, and we intend to file a file a motion to dismiss this
16 case based on those jurisdictional defenses because with all
17 due respect, we don't believe the Court has the authority to
18 issue an injunction when it has no jurisdiction to issue those
19 orders, and the cases again we've cited made that clear. I
20 think we had quotes that the Court has no choice but to
21 dismiss the case in the absence of, for instance, a mandatory
22 duty or in the absence of a private right of action.

23 But if we get to down the road the navigability
24 issue, Mr. Addison is right, there are certain actions which
25 can occur under a river which may impact navigability, but

1 only where the river is deemed to be navigable. And in this
2 case since 1983 it's been clear that only the last two miles
3 of this river, which is 21 miles downstream from this project,
4 is navigable. So no matter what the action is, they could be
5 coming in and, you know, building a bridge, building a dock,
6 building anything, if it's not in a navigable portion of the
7 river, it's not subject to the jurisdiction under that act.

8 Now, they may have some dispute about that and they
9 may have the right to challenge that if it's not already
10 barred by the statute of limitations because the Corps made
11 this determination originally in 1983. They made it again in
12 2012 as to what portion of the river is navigable or not. But
13 let's say you even get beyond that and they want to dispute
14 that fact. We're here on a preliminary injunction. They have
15 to show a high likelihood of success on the merits that the
16 actions that they are referring to, which the state court has
17 already rejected as interfering with navigability, in fact
18 interfere with a navigable portion of the river. And under
19 those determinations, I submit that there is no way they can
20 show a likelihood of success on the merits at this stage, and
21 for the last three decades the Corps of Engineers has made
22 clear that only the last two miles of the river are navigable.

23 As I stated at the beginning again, and again, my
24 colleagues are here to answer any questions you want on the
25 other statutes, but the other statutes, and plaintiffs admit

1 this essentially in their brief, they're all contingent on a
2 duty, on a mandatory duty under NEPA, the National Historic
3 Preservation Act, and the Endangered Species Act of having a
4 duty. They all require a federal action, a federal license or
5 federal financial involvement, and none of that is involved
6 here. And the fact that the Corps or EPA could have
7 discretion to act doesn't change that fact. There has to be
8 an affirmative federal action. And so none of those statutes
9 are triggered in this case.

10 Just to then briefly go to the other preliminary
11 injunction factors, I think the Court has recognized this, but
12 there clearly is nothing irreparable or imminent that's going
13 to occur here, and it has to be both of those. There's
14 nothing imminent that any harm that's alleged that's going to
15 occur can't await final resolution of this case, and there's
16 nothing irreparable either. If the Court had jurisdiction
17 under these statutes, it could require mitigation and
18 restoration of any damage that's done. And in fact that's how
19 it almost always works because the way these statutes work is
20 if a violation occurs, it gets referred to my office, to the
21 Attorney General. The Corps makes a determination that we
22 think a violation of Section 301 or Section 403 of the Rivers
23 and Harbors Act has occurred. Something needs to be done to
24 stop this. Go into court and get an injunction and get
25 restoration and mitigation.

1 So those are the remedies that are available, and
2 the plaintiffs have made no showing that whatever damage that
3 may occur cannot be resolved through restoration and
4 mitigation as occurs at least on the Clean Water Act side in
5 almost every Clean Water Act case. That's part of the process
6 there.

7 In fact, if you look at the relief they seek, what
8 they're seeking is for us to turn to Kennecott and say, Get a
9 permit. Well, that's not going to stop any project. They
10 very well admit in their reply brief that they filed this
11 morning that they can't tell us how to decide that. All
12 they're asking is that we tell Kennecott to go ahead and take
13 those actions. But we can write a letter and say, Get a
14 permit, please get a permit, we think you need a permit, we
15 require you to get a permit, and that's not going to stop the
16 construction that's going on there.

17 So the relief they seek against us is not going to
18 address the damage that they say is going to occur even if we
19 issued a cease and desist order. Happens all the time. The
20 Corps determines based on whatever evidence and makes a
21 determination it wants to pursue a potential violation, it
22 issues a cease and desist order, and the parties may have a
23 disagreement and they go ahead and they ignore the cease and
24 desist order. The only thing that would get the relief that
25 plaintiffs require is if we brought an action to your court or

1 to a similar court seeking to enjoin that action. But that is
2 totally within our discretion. That is not a mandatory
3 review. That is not something that they can require us to do.

4 THE COURT: So in other words, what you're kind of
5 hinting about is even if this Court said, You tell Kennecott
6 to go get a license or go get a permit, if this Court told
7 you, you would still have the discretion, even though the
8 Court was telling you that, you would still have the
9 discretion as to whether to do it or not.

10 MR. ROSEN: That's absolutely correct.

11 THE COURT: By statute. That's what you're
12 contending?

13 MR. ROSEN: Yes, yes. And if you read the brief
14 this morning again filed by Huron, they say the same thing.
15 They say we're not asking or requiring that the agency make a
16 specific decision, just make a decision.

17 And finally, on the public interest, there's an
18 important public interest involved here, and I won't get into
19 the weighing of the harms and the economic harms. I think
20 Kennecott's counsel will do that. But as the Supreme Court
21 said in the Oakland case, there's an important public interest
22 in making sure statutes are administered the way Congress
23 designed them to be administered.

24 In the case of the Clean Water Act, the assumption,
25 one of the things Congress did is say that we're going to have

1 some division of responsibility and we're going to have some
2 responsibility to states who are willing to take those
3 responsibilities and follow the rules. And under those rules
4 we're going to suspend the ability of the Corps of Engineers
5 to address that as long as Michigan complies with the basic
6 requirements, and Michigan has been complying with the basic
7 requirements. And plaintiffs would like us to turn that
8 completely upside down, completely usurp Michigan's authority
9 which it has agreed to under this structure that Congress
10 established.

11 And then more generally, Congress established a
12 process under both the Clean Water Act and the Rivers and
13 Harbors Act that if someone believes on their own
14 determination they're going to potentially violate those
15 provisions and subject themselves to civil and criminal
16 liability and significant penalties, there's a way around
17 that. They can come to the Corps of Engineers and seek a
18 permit. But that's their choice.

19 What Congress set up is that individuals -- you
20 know, I mean, there's going to be lots of situations where if
21 you can force the Corps to go demand and require a permit for
22 every project where somebody thinks somebody's doing something
23 wrong, you're going to have two neighbors who are fighting
24 over one person thinks it's a puddle and one person thinks
25 it's a wetland and they're going to be going into court and

1 going to the Corps of Engineers and saying, You have to do an
2 investigation because we think there's a Clean Water Act
3 violation because that's interference and filling and
4 dredging. This guy put a barrel of dirt into this puddle and
5 we think that's filling a wetland in violation of the act.

6 That is at the discretion of the Corps of
7 Engineers. Even that homeowner can address that on his own if
8 he isn't satisfied by the reaction of the Corps of Engineers
9 through the citizen suit provision. So that's the important
10 structure that Congress established and that's the public
11 policy that gets upheld by following that structure.

12 If the Court has no other questions?

13 THE COURT: Thank you.

14 MR. ROSEN: Thank you.

15 THE COURT: Thank you.

16 Mr. Ettinger on behalf of Kennecott.

17 MR. ETTINGER: Good afternoon, Your Honor.

18 I must say that when this lawsuit first came across
19 my desk, it reminded me of the old Yogi Berra quote: "It's
20 like deja vu all over again." And having lived this for the
21 past six years, it truly is.

22 As we noted in our papers, this is the Club's ninth
23 challenge to Kennecott's underground mine over the past six
24 years. The Club's challenged everything from the
25 administrative completeness decision of the State of Michigan

1 regarding its mine permit application to its state surface
2 lease issued by the state to every single state permit that
3 Kennecott has ever been issued, and clearly the Club is
4 desperately trying to block the project and they're looking
5 for any excuse to cause that delay. And with all due respect
6 to the Huron Mountain Club, this challenge truly may be the
7 most outrageous and cynical of all.

8 We're talking now six years after Kennecott filed
9 its mining permit application with the state, four years after
10 the Club participated in a 42-day contested case hearing in
11 which it litigated and lost the very issues that are at play
12 here, two years after Kennecott began construction under its
13 state permits, and eight months now after Kennecott began
14 underground construction. The Club claims for the first time,
15 and literally out of the blue, Your Honor, we had no idea this
16 was coming, hadn't heard anything about this, totally out of
17 the blue, that Kennecott should be forced to get federal
18 permits under the Clean Water Act and the Rivers and Harbors
19 Act for the underground work it started eight months ago and
20 it must immediately shut down its operations indefinitely
21 until it applies for and gets those permits regardless of the
22 tremendous impacts that will have.

23 THE COURT: As an officer of this Court, your
24 opposing counsel here, with all due respect, said that this
25 never dawned on the client or apparently this is the first

1 time, having come to him, he said, What about federal? Do you
2 have information to the contrary?

3 MR. ETTINGER: I have no idea whether it's ever come
4 to the light of the Huron Mountain Club as to these particular
5 claims. But the factual issues that are in play and even the
6 notion that it might impede the flow of the Salmon Trout
7 River, our mine, or might impact wetlands, those are issues
8 that the Huron Mountain Club has been litigating for six
9 years. As we submitted in our papers, they've made extensive
10 comments with their co-litigants, MWF and the Keweenaw Bay
11 Indian Community, talking about these very issues, talking
12 about additional state and federal permits, including federal
13 permits that they didn't litigate.

14 THE COURT: That was my point. Was reference made
15 in those hearings to federal permits?

16 MR. ETTINGER: Never, Your Honor. I mean, we
17 literally -- this is -- well, federal permits were mentioned
18 in the comment period.

19 THE COURT: That's what I meant.

20 MR. ETTINGER: Yes. But when they actually filed
21 their contested case petition in December of 2007, there was
22 never any mention of federal permits under the Clean Water Act
23 or the Rivers and Harbors Act. What they did do, though, is
24 demand and suggest that Kennecott needed to get what I would
25 call the state analogues of those permits. One is really not

1 an analogue. As Mr. Rosen alluded to, it's the delegated 404
2 permit which is Part 303 of NREPA which deals with wetlands.
3 With respect to inland lakes and streams, which is Part 301 of
4 NREPA, they claimed that we needed to get a permit and could
5 not proceed with our mine until we did in part because it was
6 going to impede the flow of, under the Inland Lakes and
7 Streams Act, a stream, which they called the Salmon Trout
8 River.

9 So no, it was not the federal claim. It was the
10 state analogue. And all of these issues were litigated
11 thoroughly would really be an understatement here, Your Honor.

12 THE COURT: What about this blowing up of the Indian
13 tribal -- that struck me today as being something kind of
14 new. I think I've gone through everything before that.
15 What's the story on that?

16 MR. ETTINGER: Your Honor, I confess that this is a
17 source of a bit of frustration. With all due respect to Mr.
18 Addison, he knows that we're not going to do that if he read
19 our papers because Paragraphs 16 and 17 of the affidavit --
20 excuse me, the declaration of Adam Burley, who is the
21 president of Kennecott Eagle Minerals Company, confirmed what
22 the Club has already known to be true, Your Honor, because
23 they've been involved in this from the start, and that is that
24 under our surface lease and under our mining permit it was
25 understood between Kennecott and the state that our portal

1 would start to the west of the outcrop and that it would be
2 drilled underneath the outcrop, not through the outcrop.
3 There would be no destruction of the outcrop.

4 As a matter of fact, the surface lease that we
5 entered into with the state -- and I'll even get you the
6 provision, Your Honor, because I think this is an important
7 point. It's Section 4(b)(6) of our surface lease, and it
8 actually is attached to our papers because it was an exhibit
9 to the claim of appeal and complaint that the Club and their
10 co-litigants filed against our surface lease. 4(b)(6)
11 prohibits mining operations on the outcrop and prohibits any
12 disturbance of the surface of the outcrop.

13 And so lest there be any doubt, Mr. Burley clarified
14 in his declaration that no, we are not going to violate our
15 lease. No, we are not going to violate our state permit. We
16 are not going to disturb the surface of the outcrop. And we
17 will not disturb the surface of the outcrop, Your Honor. I
18 don't know where the Club's information is coming from.

19 THE COURT: If I went there today, I could find it?

20 MR. ETTINGER: You could find it and you could point
21 to it. Actually I'll show you a few pictures that would
22 corroborate that in a second, Your Honor. It's there. It
23 will remain there. It is fenced off to deal with MSHA
24 regulations, so yes, it is fenced off. And so no, we have not
25 provided -- there was an allusion that we have not provided

1 unlimited access to the tribe, and that's correct, Your Honor.
2 We will provide reasonable access to the tribe. We have in
3 the past and we will in the future.

4 THE COURT: What does that mean?

5 MR. ETTINGER: Well, we need some sort of
6 notification. You know, there are certain protocols. But
7 we're not going to just deny people and say, No, this is our
8 mine and you can't show up here. So the tribe members have
9 been afforded access to the outcrop. We have to go through a
10 safety protocol to make sure that we're complying with health
11 and safety regulations, but they're pretty minimal.

12 THE COURT: Is it -- I gather, I think I saw
13 somewhere, maybe on the map here, I gather it's part of that
14 92-acre area that's being used as the tunnel?

15 MR. ETTINGER: Correct, and maybe I can actually
16 pull up a picture that would actually show that, and that
17 would probably be Exhibit 4. Exhibit 4. Let's see if I can
18 do this right. There's the outcrop, Your Honor. There's the
19 outcrop.

20 THE COURT: So the path of decline goes right down
21 beside it?

22 MR. ETTINGER: It goes underneath it. It does not
23 go into it. Part of what we agreed to with the state, and in
24 part this was because of input from the tribe, is that we
25 would go underneath it; that we would not affect the surface

1 of it at all. So we agreed to go underneath it, and we did.
2 We did this back in September.

3 THE COURT: And never destabilized it?

4 MR. ETTINGER: No, no. And there was testimony
5 actually during -- this issue came up during the contested
6 case hearing, and this was actually -- this was the subject of
7 the last time I was trying to defend against an injunction of
8 underground construction which was before Judge Manderfield in
9 the Ingham County Circuit Court last September and this issue
10 came up, and the claim was made then by Huron Mountain Club's
11 other counsel and KBIC's counsel that you're going to
12 destabilize and blow up the rock. All of the -- Tracy Arlo
13 was the name of the witness at the contested case hearing, and
14 she testified unequivocally without rebuttal that we were not
15 going to destabilize the rock.

16 Mind you, it's done now. We have created the
17 portal. We're now going down the decline past where the
18 outcrop is, and it has not been destabilized in the least and
19 tribe members have been provided access, and again, will
20 continue to be provided access since the portal was created,
21 since the area has been fenced off. And that is corroborated
22 by Paragraphs 16 and 17 of the declaration of Adam Burley.

23 THE COURT: I take the fencing is in part because
24 you have trucking and you have some heavy equipment in the
25 area and you don't want anybody -- you have liability for

1 anybody hurt in the course of that trucking.

2 MR. ETTINGER: Correct. Correct, Your Honor, and
3 that's why when I say reasonable access, we need to be able to
4 do a safety induction and things like that, which, you know,
5 Kennecott and Rio Tinto, its parent company, take extremely
6 seriously. So we have to address those things. We've
7 actually -- within the bounds, we've tried to make the
8 restrictions as minimal as possible. We respect the tribe's
9 concerns and we've tried to address those concerns as best we
10 can.

11 THE COURT: Okay.

12 MR. ETTINGER: And so, yeah, I appreciate Your Honor
13 giving me the opportunity to address that issue. Your Honor,
14 frankly, I don't know where their information is coming from
15 on this secondary explosion or secondary portal. It just
16 doesn't exist. It's not going to happen, Your Honor.

17 You know, the Club doesn't want Kennecott to
18 actually engage in the conduct they say Kennecott needs
19 permits for. They want to force Kennecott to apply for
20 permits that they don't need, mind you, to add more process
21 that will delay the project. And I do want to show Your Honor
22 just a few pictures to provide some context.

23 Let's go to Exhibit 1, Nicole, please, just to
24 provide a bit of context, and I won't belabor these pictures.
25 This first exhibit just shows -- and this is one attachment to

1 the NHPA assessment that we provided to the Court with our
2 papers. This shows where the project is, and you can see the
3 proximity to Marquette as well as to Lake Superior.

4 THE COURT: There's a little town about two miles
5 north. What is it called?

6 MR. ETTINGER: Dodge City.

7 THE COURT: Dodge City. Is there a town there or is
8 it just the name of a --

9 MR. ETTINGER: I've been up to the -- I confess I've
10 been to the project site many times, and if Dodge City is a
11 town, I missed it.

12 THE COURT: A lot of the U.P. is like that. But as
13 I understand it, it's two miles directly south?

14 MR. ETTINGER: Yeah, and I have usually come from
15 the other direction from the Triple A Road, Big Bay being
16 really the closest town of any --

17 THE COURT: Well, I note in the last -- I've got a
18 very detailed state map with counties and pretty well
19 outlined, and that last one, it has the river in question here
20 as coming up toward that area but stopping, oh, about a
21 quarter of a mile or a half a mile to the juncture of exactly
22 two miles south of Dodge City. But it shows it, but it
23 doesn't come up that far.

24 MR. ETTINGER: That doesn't surprise me, Your Honor,
25 because I mean essentially you're talking about what's some

1 swampland at this point. We attached some pictures with the
2 affidavit of -- excuse me, the declaration of Dan Wiitala.

3 THE COURT: I couldn't gain anything from those
4 pictures. It looked like a rose garden or one of those
5 floating things that people have in their front yard. It
6 didn't look like much. I didn't get any perspective on it.

7 MR. ETTINGER: It certainly doesn't look like a
8 river, and it's because it's about, you know, half a foot
9 deep. It's a few feet wide. I mean, it's nothing much, and
10 that may explain -- I'm only speculating at this point, Your
11 Honor, but it may explain why the map doesn't look to extend
12 it down that far. These are essentially a little bit of
13 swampland and some wetlands at this point.

14 THE COURT: But you agree it's the headwater?

15 MR. ETTINGER: It's the headwaters, correct.
16 Correct, but we don't believe it's navigable.

17 THE COURT: How far on the back side of the -- we're
18 looking at the front side toward Huron Mountain Club. How far
19 behind us does the headwater extend?

20 MR. ETTINGER: Honestly, Your Honor, I don't know.
21 I believe that we are in river miles I think about four river
22 miles from the nearest Huron Mountain Club property.

23 THE COURT: I think I saw 3.8 miles somewhere.

24 MR. ETTINGER: Okay, so close to that. And my
25 understanding is that from the headwaters, and there are a few

1 other tributaries, from the headwaters all the way to Lake
2 Superior is approximately 22 river miles. Again, it's not --
3 as the crow flies it's not 22 miles, but river miles it's
4 approximately 22.

5 We can move to the next picture, Nicole, please.
6 Oh, I'm sorry. That would be the March photo, the earlier
7 one. There, thank you. This is again to give some
8 perspective. This was from the contested case hearing. This
9 was one of the exhibits.

10 THE COURT: Is that the Yellow Dog Plain, that large
11 football there?

12 MR. ETTINGER: Correct. That is the Yellow Dog
13 Plains. And what distinguishes it is far from the sort of
14 pristine wonderland that the Huron Mountain Club has portrayed
15 in its papers not just today, but as I have lived this case
16 for the past six years. What this area has been used for
17 primarily for the past hundred-plus years is logging. That is
18 correct. And where that little yellow -- it may be hard to
19 spot, Your Honor, but that little yellow dot there in the
20 middle is where the ore body is.

21 And so we would agree that there has been logging
22 activity, and it's even better shown from the next picture,
23 Nicole, please. Thank you. And again, the ore body would be
24 over around this area there. This is the Triple A Road that
25 comes up, and then the outcrop is there. This is now where

1 the surface facilities are, all around here, and the portal is
2 over here just to the west. So it's kind of where -- I guess
3 north would be off that way.

4 THE COURT: So where is the headwater? The
5 headwater is where you've got the left circle?

6 MR. ETTINGER: They're kind of over here and they
7 kind meander up and there's some wetlands around there. But
8 as you can see even actively, this area as you can see is
9 still a checkerboard of logging activity. I don't want to
10 belabor this point because I don't think it's integral to this
11 particular motion, maybe for some motion sometime down the
12 line, but one thing I would take issue is I notice Mr. Addison
13 talks about the fact that the area has been used for logging.
14 We don't disagree with that. But there's no evidence that
15 that aspect of the Salmon Trout River has ever been used to
16 float logs, which is a much different issue.

17 THE COURT: I think there's -- as I recall, this
18 Reinholdt, the historian, Rein --

19 MR. ETTINGER: Dr. Greenwald?

20 THE COURT: No, Rein -- the fellow that just died.
21 He was a historian in Marquette.

22 MR. ETTINGER: Oh, Fred Rydholm.

23 THE COURT: Frederick?

24 MR. ETTINGER: Fred Rydholm, yes. Rydholm I believe
25 is his last name if I'm pronouncing it correctly.

1 THE COURT: Rydholm. He suggests -- because I read
2 pretty much all his stuff when I was first appointed and he
3 was writing. In fact, he autographed a couple of them for me
4 and I read them. He suggested that there was a lot of
5 railroad activity, narrow-gauge railroad activity up through
6 this area at one time and the logging was largely done through
7 railroad. That was his historical reference, except for when
8 you get down closer to the lakes. That was his reference as I
9 recall.

10 MR. ETTINGER: And that would make sense to me, Your
11 Honor. I have not seen any references in the historical
12 literature or otherwise. I'm certainly not testifying here
13 today, but I --

14 THE COURT: No, I'm just making --

15 MR. ETTINGER: But I don't -- I'm not aware of any
16 floating of logs or using the river for that purpose, which is
17 different from the issue of whether the area was logged.
18 Unquestionably that area has been logged and continues to be
19 logged. That's the main industry in that area.

20 THE COURT: But this whole plain, Yellow Dog Plain,
21 is primarily state and paper company and other agriculture,
22 timber-creating lands, are they not?

23 MR. ETTINGER: That's correct. There's a lot of
24 state land here. And again, one of the reasons we had to get
25 a lease was because that area where our surface facilities

1 are and where the outcrop is is state land and continues to be
2 state land.

3 THE COURT: Wasn't that part of the McCormick tract
4 at one time, some of this?

5 MR. ETTINGER: I think it's close by. I don't think
6 it's actually part of the tract, but it's pretty close by.
7 There's a McCormick Road in this area, that's correct, Your
8 Honor.

9 THE COURT: And what I understand is this area
10 largely -- in this White Dog Plains is largely -- how do I
11 want to say this and be respectful? The ground is not
12 particularly blessed with having a lot of nutrients in it.
13 It's rather light sand and apparently light stuff.

14 MR. ETTINGER: Well, it's interesting that you
15 mention that, Your Honor. Again, just adding some context to
16 this, at the contested case hearing one of the naturalists, I
17 think his name was Kerry Woods, that the Huron Mountain Club
18 had testify, he talked about Aldo Leopold, who was the
19 naturalist that the Club hired back in I think it was the '30s
20 to come up with a plan that's part of their complaint and
21 their preliminary injunction papers. And this is on Page 7
22 actually of the administrative law judge's decision where he
23 references Aldo Leopold's consideration of the Yellow Dog
24 Plains, and he described the mine area as, quote, "slashed and
25 destroyed," close quote, to such an extent so as to, open

1 quote, "destroy its value as a natural area for scientific
2 study," close quote. So that was Aldo Leopold back at about
3 the same time that he's working with the Huron Mountain Club.

4 THE COURT: That was almost a hundred years ago?

5 MR. ETTINGER: This would have been, yeah, about 80
6 years ago. I think it was back in the '30s or '40s that he
7 talked about that.

8 THE COURT: Why hasn't this been reseeded? I mean,
9 why hasn't this been --

10 MR. ETTINGER: I don't know, Your Honor. I
11 honestly don't know. I think there are a lot of areas around
12 there -- I think part of it has to do with the nature of the
13 land and the geological formations that are in that area.
14 It's a natural plains area. What's striking to me is that
15 that orthograph that I just showed, I mean, you go to Google
16 Earth, I mean, it's striking how different that area is from
17 the surrounding areas in terms of its features and in terms of
18 how it's been used historically. It's very different, Your
19 Honor.

20 THE COURT: But you would be of the belief based
21 upon the previous picture you showed me that this is on the
22 corner of it or it's up in the northern corner of the plains?

23 MR. ETTINGER: Actually I think it's pretty much --
24 can we go back to that picture real quick, Nicole? In some
25 ways it's kind of --

1 THE COURT: Well, no, it isn't.

2 MR. ETTINGER: -- right in the middle.

3 THE COURT: Almost in the middle.

4 MR. ETTINGER: Yeah. It's right in the middle of
5 it.

6 THE COURT: In the middle of it, okay.

7 MR. ETTINGER: And again, my only caveat is that
8 this picture is seven years old, so there will be different,
9 you know, logging activity going on. The patchwork might look
10 a little bit different today than it did seven years ago.

11 THE COURT: And the plain is about 15 miles long and
12 about three or four miles wide?

13 MR. ETTINGER: I think that's about right, Your
14 Honor, correct. Correct.

15 Just to give the Court some idea of what we've been
16 doing over the past six years, if we go to I think it's
17 Exhibit 4, that's April of 2012, Your Honor, and we showed
18 this picture. It shows our surface facilities. We began
19 constructing those facilities after we received our state
20 permits. We received those permits finally in January of 2010
21 after the contested case hearing, after a final decision and
22 order from the MDEQ. Four months later, because as you know
23 you can't break ground in January in the Yellow Dog Plains, we
24 broke ground in April, and that's where the surface facilities
25 are now, Your Honor. That's the state of things.

1 THE COURT: Where the ore is to be melted is not
2 here; it's offsite?

3 MR. ETTINGER: It's going to be in Humboldt, Your
4 Honor. The Humboldt Mill is where it's going to --

5 THE COURT: How far is that?

6 MR. ETTINGER: Your Honor, honestly I believe 20 or
7 25 miles, but I could be incorrect about that. That's I
8 believe to the south, Your Honor.

9 THE COURT: And that has its own shares of concern
10 because of the nature of the refining process?

11 MR. ETTINGER: Well, I suppose so, although what
12 we're doing is this is a site that we're rehabilitating that
13 there's been some concern about in the past. So we've been
14 cleaning it up and then we're going to essentially rebuild
15 it. And as noted from one of the declarations that we
16 attached from the Humboldt Township super -- I think it was the
17 clerk, Your Honor, it's going to be quite a boon to that
18 township as well.

19 Nicole, could you please go to the next picture?
20 This just shows -- this was, what, two weeks ago. This is
21 what we've been doing for the past eight months, Your Honor,
22 after we constructed the portal. It's not the greatest
23 lighting in the world, but we're underground. We've been
24 drilling the portal.

25 And if we could just go quickly to the next picture,

1 and this is the sketch that was Exhibit B to the declaration
2 of Adam Burley. Here's where we were, circling it, in
3 September of 2011 after Judge Manderfield denied the Club's
4 last motion for injunctive relief to stay the construction
5 underground, and then the decline. We've gone and we're right
6 here, Point 2, as of May 23rd, the date of that picture.
7 We're about 800 linear meters down the decline. We drilled
8 approximately a thousand linear meters, and the reason for
9 that discrepancy is there's some little outposts here for
10 safety reasons so if there's an issue or something like that
11 in terms of health or safety, we've got these little outposts
12 here. So we've drilled a few little extra outposts for
13 turnarounds and things like that. So we are about 800 meters
14 or so down the decline, and that's where we are as of -- that
15 was as of May 23rd.

16 And again, I show these by way of context and I'll
17 refer to them in a few minutes some more, Your Honor, in
18 particular the one that is still up on the screen, and I'm
19 going to try very hard not to repeat anything that Mr. Rosen
20 has already covered. There are numerous problems with the
21 Club's lawsuit and this preliminary injunction, Your Honor,
22 and I'll try again and rest in large part on our papers.

23 The first point that Mr. Rosen has alluded to in
24 considerable detail is that the Club's pursuing truly
25 unprecedented legal claims. The second is that the underlying

1 issues here have already been litigated extensively between
2 Kennecott and the Club, and in the reply papers that I was
3 able to review briefly this morning, the Club makes note of
4 the fact that none of the federal defendants were involved in
5 all that litigation. I'm sure they're very happy about that
6 as well, but the Club was and Kennecott was, and they're
7 trying to stop our project and they're trying to use the very
8 same issues that they've used for the past six years that were
9 already litigated. And the issues that were already litigated
10 include the issues related to this preliminary injunction
11 motion, Your Honor.

12 As I referred to you a few minutes ago, Your Honor,
13 the Club moved to enjoin underground construction in state
14 court last fall, and it was based in part on concerns about
15 the alleged collapse of the crown pillar of the mine and the
16 alleged impact on surface waters. And they lost on every
17 injunction factor in circuit court, and we did attach for Your
18 Honor the ruling part of the hearing transcript, the September
19 14th, 2011 hearing transcript before the Ingham County Circuit
20 Court. And they lost on every factor, including the issue of
21 whether the collapse of the crown pillar and impacts on the
22 Salmon Trout River and wetlands would cause irreparable harm
23 and on the issue related to the significant harm that would be
24 caused to the public if the underground work was stayed.

25 And we've already noted that this has been going on

1 for eight months. The Club says that these permits are
2 absolute preconditions. That's mentioned numerous times in
3 their complaint that these permits are absolute preconditions
4 to Kennecott's ability to legally construct or operate the
5 mine. But another problem -- and Mr. Addison is focusing on
6 laches. I think we have a valid laches defense, Your Honor,
7 but in some ways for purposes of this motion we can call it
8 laches or we can consider it as part of the four factors that
9 the burden -- that the Club has the burden of proving in this
10 case, that either way there's simply no explanation for their
11 delay in filing this suit.

12 I understand Mr. Addison did not get involved till
13 March, but the Club's been involved from day one, before day
14 one. They were involved -- Mr. Power, who is one of the
15 affiants in this case, Mr. Power was part of the stakeholder
16 group that actually came up with Part 632, which is the
17 nonferrous metallic mining statute that's been in play that
18 was adopted in 2004. He was part of that work group and he
19 endorsed the statute that we have gotten permits under, and I
20 think we've referred to some quotes of him in our papers.

21 The fourth problem is a preliminary injunction would
22 cost Kennecott and the local community jobs and millions of
23 dollars. There's really no dispute about this. Mr. Addison
24 tries to dispute the significance of that, but you can't
25 dispute the fact of it. It's going to have a huge negative

1 impact on the Marquette community.

2 I'm just going to try and address a few issues on
3 each prong very briefly, Your Honor. On the merits, again,
4 I'm not going to address the issue of subject matter
5 jurisdiction. I think Mr. Rosen has made it quite clear that
6 there's no mandatory duty on the part of the Army Corps to
7 require Kennecott to obtain permits. Those are discretionary
8 acts, like prosecutorial discretion, I think, as the Heckler
9 v. Chaney Supreme Court case mentions, and there's no legal
10 precedent to support what the Club is suggesting here.

11 I do want to emphasize, and it was actually a point
12 that Mr. Addison made, Kennecott is a private party. The
13 burden is on us in the sense that if we think we need a
14 permit, the burden is on us to apply for it or not apply for
15 it. That's up to us. And if we don't apply for it and
16 somebody thinks we need it, if it's the Army Corps, they can
17 take enforcement action. They can do all sorts of bad things
18 that Mr. Rosen has already talked about today and in his
19 papers. But it's not incumbent upon us to ever apply for a
20 permit. That's true under the Rivers and Harbors Act and
21 that's true under the Clean Water Act.

22 Under the Clean Water Act, again, we don't have to
23 apply for a permit. And we didn't, by the way, we didn't
24 apply for these permits, Your Honor, because we didn't think
25 we needed them, and I think the contested case has validated

1 the fact we didn't need them. And I would also like to
2 observe that we certainly didn't keep this a secret that we
3 were not applying for these permits. Part 632, while it's
4 only dealing with state permits, has a provision in terms of
5 the application that you need to disclose all permits that
6 you're going to seek, state and federal, whether they're under
7 the jurisdiction of MDEQ or not, and we listed all of the
8 permits that we thought we needed. This was back in February
9 of 2006 in our 10,000-page mining permit application, and we
10 never mentioned a Clean Water Act permit and we never
11 mentioned a Rivers and Harbors Act permit.

12 By the way, we also didn't mention a permit under
13 Part 303 of NREPA, which would be the delegated wetlands
14 permit. None of those were mentioned. The entire world,
15 including the Huron Mountain Club, was on notice that we have
16 no intention of seeking those permits.

17 THE COURT: And your reason?

18 MR. ETTINGER: Any reason that we didn't think we
19 needed them?

20 THE COURT: The reason you didn't think you'd need
21 them.

22 MR. ETTINGER: Because we did not believe that we
23 were going to be impacting -- among others, and there are
24 numerous reasons, but among others would be that we didn't
25 believe that we were going to be impacting the Salmon Trout

1 River or the wetlands that would be far above where the
2 underground mine is going to be. And again, we believe that
3 was validated by the 42-day contested case hearing.

4 THE COURT: You had reason to believe at some point
5 that the outflow of the river above would be affected by the
6 excavation below, did you not? But you concluded as I recall
7 that the ultimate sanitized water treatment water that would
8 be then ingested into the stream would more than make up for
9 what was being lost down.

10 MR. ETTINGER: That's true, Your Honor, although the
11 numbers that we're talking about are de minimis at best. So
12 what the administrative law judge found was that the modeling
13 that we did, and we did modeling back in 2006 and then we had
14 it peer-reviewed for purposes of the contested case hearing,
15 and what the modeling predicted was a reduction of six
16 one-hundredths of a foot in stream levels near -- that's right
17 near the ore body, and that's during low flow conditions. And
18 that's correct that even those de minimis impacts, that would
19 be made up for with the injection of purified water,
20 essentially.

21 THE COURT: But plaintiff's counsel makes a cogent
22 point. He makes a point did you not pick the lowest in order
23 to see the least harm done?

24 MR. ETTINGER: No, we -- actually, I'm glad Your
25 Honor raised this issue. This again was litigated at the

1 contested case hearing. Where your --

2 THE COURT: Was Huron Mountain Club taking the
3 position there was more water coming in than needed?

4 MR. ETTINGER: They did take that position, and we
5 took the position that the numbers we were using were
6 conservative and reasonable and that the numbers in terms of
7 predicted flow, inflow were ridiculously unreasonable. And
8 what the administrative law judge ruled on Pages 115 and 116
9 of its decision were that: "The record establishes, however,
10 that these assumptions," and I could really go on on this, but
11 "that these assumptions to support petitioners'," including
12 the Club, "alternative hypotheses of much higher inflows are
13 not supported by the actual data developed in the field by
14 Kennecott's investigations, and so I find as a matter
15 of fact." So I understand that that's their claim and that's
16 their allegation, but it's been litigated and they lost, and
17 then they lost again before the circuit who had a chance to
18 review that as well.

19 I'd like to -- again, just going back to the subject
20 matter jurisdiction, I do want to echo a point that was made
21 by Mr. Rosen, which is really because they don't have any EPA
22 claims, there is no subject matter jurisdiction. And for
23 purposes of this motion, really that should be the end of the
24 matter because, of course, as Your Honor knows, the Court must
25 be satisfied that there is subject matter jurisdiction before

1 issuing a preliminary injunction and for that matter taking
2 any further action.

3 But beyond that I would like to address an issue
4 that's sort of uniquely within my purview relative to the
5 federal government, and it's something that we've already
6 alluded to, and that is that the merits of this lawsuit and
7 this motion have already been litigated over the past six
8 years, and the Huron Mountain Club hasn't just lost once or
9 twice. They've lost every time. And I understand that they
10 are saying they have federal claims, and we're not claiming
11 claim preclusion, Your Honor. What we're talking about are
12 the issues.

13 They're trying to relitigate these same issues under
14 the guise of new federal claims, and essentially what they
15 want to do is pretend that there's a blank slate for purposes
16 of this motion. We're just going to look at it all over
17 again. And they can't do that. It's not about a battle of
18 the experts anymore where they pick out a few folks and we
19 pick out a few folks and say, Here's what they say, here's
20 what they say. You know, they cherrypick some stuff and say,
21 Well, this is clear that there's a problem here.

22 At the end of the day we have an administrative law
23 judge who, after 42 days of testimony, after a two-day site
24 visit including at the Huron Mountain Club's insistence going
25 to look at the Huron Mountain Club as part of this, that was

1 all part of his ultimate decision was even going up to the
2 site for two days. After reviewing the record, after
3 determining credibility issues, after reviewing over 500
4 exhibits that were admitted, 60 witnesses, over 1,000 pages of
5 briefing, Your Honor, after doing all of that, he issued a
6 decision and said that Kennecott's mine was going to be
7 protective of the environment, and that was ultimately
8 affirmed in the final decision and order of the Michigan
9 Department of Environmental Quality.

10 But it didn't end there because the Huron Mountain
11 Club and their co-litigants, they appealed that to the Ingham
12 County Circuit Court and Judge Manderfield, and she heard, I
13 think this is a pretty conservative estimate, about seven
14 hours of oral argument on the appeals, which makes her
15 extremely patient, and after that she issued a 100-plus-page
16 decision affirming our Part 632 permit and affirming the ALJ's
17 decision. So that's the record we have, Your Honor, and I
18 would say at the very least these decisions indicate that the
19 Club is highly unlikely, highly unlikely to succeed on the
20 merits of its claims. But beyond that, we do think that these
21 rulings collaterally estop the Club from relitigating issues
22 that it's already litigated with Kennecott and lost at the
23 agency and state circuit court levels.

24 And again on the key issues, not to belabor this,
25 but on the issue of the mine not collapsing, the proposal for

1 decision of the ALJ spent 23 pages dealing with that issue,
2 Pages 29 through 52 of the administrative law judge's proposal
3 for decision dealing with that, and the circuit court, Pages
4 10 through 16 of its decision where it said that Kennecott and
5 the Michigan Department of Environmental Quality experts
6 nullified the concerns of petitioners' experts on the issue of
7 whether the mine has a potential to collapse. And they all
8 ruled that an 87.5-meter crown pillar is stable, safe, and
9 protective of the environment.

10 That's very conservative, Your Honor, because that
11 doesn't even consider -- all the testimony that you've heard
12 about from the Club or you've heard described by the Club
13 doesn't even take into consideration that there's not going to
14 be this open void below the surface because Kennecott is
15 planning to engage in serious tight backfill of the stopes
16 where they're mining the ore body, so it's not going to be
17 some open void. So that 87.5-meter number and the safety that
18 was considered there doesn't even consider the tight backfill
19 issue. So that was saying it's safe even if there is an open
20 void.

21 And by the way, there's this notion that this is
22 somehow unprecedented, Your Honor. I haven't been to the
23 mine, but my understanding is Cliffs has a mine in Ishpeming
24 and that the entire city of Ishpeming is on top of, including
25 several lakes as I understand it, is on top of an underground

1 mine, which by the way as I understand it has not been
2 backfilled. So the notion that this sort of thing is
3 unprecedented truly doesn't withstand scrutiny, Your Honor.

4 The second issue, the mine won't adversely affect
5 wetlands or the flow of the Salmon Trout River. Again, just
6 for the record, Your Honor, the proposal for decision, Pages
7 94 through 116 of the ALJ's proposal for decision dealt with
8 that issue and said no impact on wetlands, essentially no
9 impacts on the Salmon Trout River near the ore body,
10 negligible as we just talked about, Your Honor.

11 Pages 29 through 39 of the circuit court opinion,
12 same thing, saying that Kennecott and MDEQ, their experts
13 nullified the petitioners' concerns. This is all in the
14 record.

15 And then I've already mentioned, Your Honor, again
16 we're not claiming claim preclusion here, but I think it is
17 important to understand that they asked us -- they told us
18 that we needed these state permits under Part 301 and Part
19 303, the state analogues of the RHA and the Clean Water Act,
20 and it was definitively ruled again by the ALJ, by MDEQ, and
21 by the circuit court that these were not necessary.

22 One thing I wanted to correct for the record, and
23 Mr. Addison may just not have been aware of this, on the issue
24 of flora and fauna, endangered species, Your Honor, that was
25 dealt with at Pages 116 through 148 of the proposal for

1 decision that was prepared by the ALJ. I'm just going to
2 quote two sentences on Page 148 just to make sure the record
3 is clear: "Accordingly, I find as a matter of fact that no
4 rare, threatened, or endangered species will be significantly
5 affected by the proposed mine. To the contrary, the record
6 demonstrates that construction and operation of the mine will
7 not significantly affect any species."

8 So the Club tacitly concedes the importance of the
9 state proceedings by relying on them in support of this
10 motion. But again, it wants to pick and choose and it wants
11 to avoid the ultimate decisions that we believe decisively
12 undercut the Club's assertion that Kennecott needs these
13 permits, and that's beyond the jurisdictional issue, Your
14 Honor.

15 I'm going to rely on our papers as well as the
16 government's argument and the government's papers on the
17 issues of navigability except to say that I truly think what
18 the Huron Mountain Club is proposing here is truly
19 unprecedented. The reason that their clients may not have
20 thought about it is because in their heart of hearts they
21 understand this is unprecedented too. We're going to be -- we
22 start mining the ore body in 2014. We're going to be a
23 thousand feet below the surface. A thousand feet, Your
24 Honor. And somehow when we start excavating and when we put
25 in backfill a thousand feet below the surface into that

1 bedrock, bedrock like the bedrock that you saw in one of those
2 pictures, the one from May 23rd, that somehow is a discharge
3 into a wetland.

4 I don't want to belabor the point, Your Honor, but
5 these are radical, radical theories that would really turn the
6 underground mining industry and the mining industry as a whole
7 on its head if these theories were ever adopted, and they're
8 unprecedented. There's no legal support for it.

9 THE COURT: Well, you start at a thousand, but you
10 come up to about 380, don't you?

11 MR. ETTINGER: We go up to about a football field
12 length crown pillar, Your Honor, exactly. That will be at its
13 highest point under the permit we have.

14 I do want to note one irony that may have been lost,
15 which is that the Part 632 permit again that we attached to
16 our papers that Kennecott has actually will provide more
17 protection through the very strict monitoring requirements and
18 mitigation measures that are required than probably will be
19 required under Section 10 of the Rivers and Harbors Act or
20 Section 404 of the Clean Waters Act, and I think the permit
21 speaks for itself on that.

22 With respect to the irreparable harm issue, Your
23 Honor, just four major problems briefly. One, again, they're
24 really relying on procedural harm at this point, but this harm
25 should be ignored because it's tied to nonexistent federal

1 actions. And I do want to note I understand that the state
2 process cannot technically replace NEPA if that were truly at
3 issue, but I do find their position of procedural harm, if
4 nothing else, somewhat ironic in light of the process that the
5 Club and its co-litigants have had over the past six years.

6 Of course, that procedural injury is not enough in a
7 vacuum. It does need to be tied to environmental harm, and
8 those harms simply are not going to occur for the reasons
9 we've just discussed. It's already been ruled that they're
10 not going to occur. Not just not imminently, ever. That's
11 what the DEQ ruled and that's what the circuit court has
12 ruled. So to say it's anything more than speculative would be
13 generous.

14 THE COURT: Tell me about the monitoring and
15 mitigation requirements that the State places upon the
16 defendants.

17 MR. ETTINGER: With respect to -- I can refer the --
18 I confess I don't have the permit in front of me, but I can
19 reference a few of them. With respect to the wetlands issue,
20 conditions L-3 through L-7 are designed to prevent impacts by
21 requiring close monitoring for drawdown and possible
22 mitigation. There are lots of things you can do to mitigate
23 if you do have drawdown. Grouting was one example that was
24 mentioned during the contested case hearing.

25 With respect to the issue of subsidence, I would

1 refer Your Honor to permit condition E-8 and permit condition
2 L-17. The permit requires continuous subsidence monitoring
3 once mining begins and the stopes are created, and if this
4 monitoring shows even the possibility of subsidence, Kennecott
5 has to stop at that point. They have to stop.

6 And again, there are, and the record is replete with
7 this and I apologize for providing the Court with a thumb
8 drive, but in the thumb drive would be the administrative
9 record from the contested case, but it's replete with
10 references that there again, there are common mitigation
11 measures to stabilize rock even under the sort of worse-case
12 scenario that's been posited by the Huron Mountain Club. Rock
13 bolting is one; use of screens; use of something called
14 shotcrete, which hopefully you won't ask me to describe
15 because I probably couldn't do a very good job of it. So
16 there are mitigation measures that are possible.

17 With respect to the imminence of the harm -- and
18 Nicole, could you put up the last -- the sketch, please,
19 again? Again, even if we were take Huron Mountain Club's
20 bombastic factual allegations about the environmental harms
21 that the mine will cause, and back in September when we had
22 the same sort of hearing, the analogy was drawn to BP. This
23 was going to be the next BP, the next Fukushima. And
24 nothing's going to happen that hasn't been happening for a
25 long time for a long time. Again, we're eight months in now

1 and, you know, we're here 800 feet in in terms of our
2 decline. We're not even going to hit a point where we can
3 begin our secondary egress shaft and our ventilation shaft
4 until the fourth quarter of this year, and that's Point 3 on
5 the sketch. We're not going to -- and then we're going to
6 spend the next year and a half, essentially, working on again
7 the decline, those shafts, the access ramps to the ore body,
8 and the mill.

9 And so we're not going to be accessing the ore body
10 or mining ore until, as we estimate right now, Point 5, the
11 first quarter of 2014. So whatever irreparable harm the Club
12 thinks is going to occur, and again, let's credit everything
13 they say for sake of argument, it's not imminent, and
14 certainly this case could be resolved by hopefully the first
15 quarter of 2014.

16 Another issue that I wanted to raise, and again,
17 whether we want to call it laches or just a consideration for
18 this Court as part of the irreparable harm factor is really
19 the stunning delay in seeking the relief that they're sought.
20 There are numerous points over the past six years where the
21 Club could and should have raised these claims if they were
22 serious and they believed that irreparable harm was going to
23 occur, whether it was to their procedural rights or whether it
24 was to the environment. And as I've thought about this, not
25 only have they not filed a lawsuit, as I understand it I don't

1 think they even called the Corps. I don't think they did
2 anything with it.

3 So even during the several months that Huron
4 Mountain Club's new counsel has been on the case, nobody
5 called anybody to say, We've got a big problem here. And
6 meanwhile we continue to spend money, hire people, invest
7 money, invest money in the community. All of that's going on,
8 and it's just inexplicable, Your Honor.

9 You know, we've mentioned some of those what I would
10 call jump-off points that it would have been logical for them
11 to have raised this sort of claim. February of 2006 would
12 have been one logical point when we filed our mining permit
13 application and we had to list all the permits that we had to
14 get and we didn't mention those permits. You know, it was
15 mentioned I believe in the Corps' declaration that they had
16 informed one of the Huron Mountain Club's co-litigants, the
17 Keweenaw Bay Indian Community, that the Corps didn't believe
18 that they had jurisdiction over this matter.

19 Now, I don't know whether or not Keweenaw Bay Indian
20 Community ever communicated that to the Club. But I do know
21 that they have submitted comments jointly, they have litigated
22 jointly, they have shared counsel. They have done everything
23 together. It is mind-boggling to me, Your Honor, that if that
24 was in the thoughts and mind of the Keweenaw Bay Indian
25 Community and their counsel back in 2005, that somebody else

1 couldn't have thought of it and expressed that concern as
2 well. January -- April of 2010 would have been another nice
3 point when we started our above-ground construction.

4 THE COURT: Tell me, did Huron Mountain Club have
5 lawyers representing them in opposition to your client? Is
6 that correct?

7 MR. ETTINGER: Correct. It was --

8 THE COURT: Were these lawyers environmental
9 lawyers?

10 MR. ETTINGER: Yes. It was Bruce Wallace of Hooper
11 Hathaway.

12 THE COURT: That's all I need to know.

13 MR. ETTINGER: Yeah. April 2010 is when we started
14 our surface facilities. We're beginning construction of a
15 mine. We're hiring more people. That would have been a
16 logical point.

17 June 2011 at the hearing on the Part 632 appeal
18 before Judge Manderfield, it was asked of us by petitioners,
19 When are you planning to start underground construction?
20 We're concerned about that. Please tell us when. And I told
21 the Court that we plan to begin underground construction
22 probably around mid-September of 2011. So at the very least
23 one would have thought, well, that's probably a good time to
24 run into court. Now we know. We've got a date. We've got a
25 date coming.

1 September 2011 would have been another good point.
2 They filed a state motion. When they lost, they didn't
3 file -- when they lost their motion for stay before Judge
4 Manderfield, they didn't seek an interlocutory appeal in the
5 Court of Appeals. Again, they didn't run into federal court.
6 They didn't talk to the Corps. They didn't do anything. They
7 let us begin our underground construction. They let us invest
8 another \$114 million in the project and in the community, and
9 they waited another eight months.

10 There's been discussion of status quo as being one
11 of the requirements, you want to maintain the status quo.
12 Kennecott's underground construction is the status quo in this
13 lawsuit, Your Honor. Again, we've done a substantial amount
14 of work, and again, \$114 million spent since September, a
15 thousand linear miles of drilling. And if the Club thought
16 this underground work would cause irreparable harm, it sure
17 didn't act like it, Your Honor.

18 I'm not going to spend a lot of time on the balance
19 of the harms. I do want to note that there was a reference
20 that somehow because they're not bringing APA claims against
21 us and they're trying to exercise jurisdiction against us
22 under the All Writs Act, that somehow the harm to Kennecott
23 doesn't come into play. We've cited to one case on Page 23 of
24 our brief a 2012 case that suggests that's not the case.
25 There are others, Your Honor, Schiavo ex rel. Schindler v.

1 Schiavo, 403 F.3d 1223, Eleventh Circuit, 2005, that
2 essentially when you're seeking what is basically injunctive
3 relief, that you follow Rule 65, and we believe they need to
4 follow Rule 65 and that the harm to Kennecott when you're
5 seeking this sort of relief is relevant.

6 I'll rely primarily on the tremendous harm that
7 would be caused to Kennecott to the declaration of Adam
8 Burley, in particular Paragraphs 8 through 14, 8 through 14,
9 as well as the declaration of one of its contractors, Mark
10 Immonen, at Paragraphs 6 through 8. I've already talked about
11 the money that's been invested. I mentioned \$114 million over
12 the past eight months, but thus far total, Kennecott -- and
13 for the U.P., I mean, this is truly just a huge deal, \$331
14 million Kennecott has invested in this project. Three hundred
15 people are working on this project right now, most of them
16 local.

17 A preliminary injunction is going to trigger all
18 sorts of delays, whether it's short or long, that will require
19 Kennecott to lay people off, demobilize equipment, and
20 terminate contracts. We're talking millions and millions of
21 dollars. And again, I'm not going to go through the
22 specifics, but I think we've shown from the declarations in
23 our papers that even a minimal delay throws the entire mine
24 schedule, including the Humboldt Mill, into disarray. Things
25 need to happen on an orderly basis.

1 With respect to the public harm, in addition to the
2 harm that the federal government has already mentioned in
3 terms of how they administer their resources and determine
4 what to enforce and what not to enforce, I think the harm to
5 the public is really un rebutted. Mr. Addison's trying to
6 diminish it and say kind of these are folks that they've
7 suggested that we've hunted out and, you know, twisted their
8 arm to have them sign these declarations. These are not
9 people that need to have their arms twisted, Your Honor.
10 These are the people that are going to be affected if this is
11 shut down and they lose their jobs and these people don't come
12 into their businesses anymore and they don't patronize these
13 places. People are going to get laid off. People are going
14 to lose money.

15 And that's just in terms of the direct impacts, the
16 capital investment, the jobs. We don't even get to the local
17 tax revenue, the revenue for state parks that will come from
18 the \$60 to \$90 million in royalties that come to the state
19 through the State Park Endowment Fund once we're mining the
20 ore body. These are all significant harms to the public, to
21 the local community, and to the state.

22 So we believe that all of the factors weigh clearly
23 in favor of denying a preliminary injunction and respectfully
24 request that Your Honor do so. Unless Your Honor has any
25 questions?

1 THE COURT: Thank you. Thank you.

2 Let's take a brief recess and then we'll proceed.

3 Anything else from the defendants' counsel? Okay. We'll come
4 back in a few minutes and proceed.

5 MR. ADDISON: Thank you, Your Honor.

6 (Proceedings recessed at 3:37 p.m.; reconvened at 3:52 p.m.)

7 THE COURT: You may proceed in this matter, Mr.
8 Addison.

9 MR. ADDISON: Thank you, Your Honor.

10 A couple of quick points off the top. The
11 government argues that enforcement is discretionary, and
12 that's absolutely correct. The regs themselves, 33 C.F.R.
13 326, at the start of that says that nothing in this part 326
14 on enforcement is non-discretionary and that enforcement is
15 discretionary. Of course, we aren't seeking enforcement. We
16 reference 326 nowhere because we're not seeking enforcement,
17 and once again, what we're seeking is for the Corps to perform
18 its mandatory duty under Section 403 of the Rivers and Harbors
19 Act and its own regulations that say Congress delegated the
20 Corps the duty to authorize or permit activities that would be
21 in conjunction with the Rivers and Harbors Act.

22 As I mentioned before, Your Honor, during our
23 earlier presentation that particular statement, quote,
24 "Congress has delegated to the Secretary of the Army in
25 Section 10 of the Rivers and Harbors Act the duty to authorize

1 or prohibit certain work or structures in navigable waters of
2 the U.S. upon recommendation of the Chief of Engineers." We
3 don't disagree with the government that we only have
4 jurisdiction if there's a mandatory duty. We just disagree
5 over whether they have that mandatory duty. And the
6 determining factor is not the interpretation of me or counsel
7 for any other party. It's what these regs say, and they
8 establish along with Section 403 a mandatory duty.

9 Now, that is distinguishable from enforcement. When
10 you go to the Corps' site, enforcement, regulatory, the
11 permitting process is regulatory, and so it's not
12 enforcement. And we would suggest to the Court that that is a
13 mandatory duty.

14 The government also argued and Kennecott apparently
15 argued that in the Clean Water Act context we don't really
16 have an APA claim because of the citizen suit provision. And
17 I've already noted, of course, that we do not have a Clean
18 Water Act claim against the government because they have not
19 violated an effluent limitation under 1365(a)(1) and they are
20 not the administrator under 1365(a)(2). The Southern District
21 of Ohio took up this exact same issue and found that there was
22 the mandatory duty and that it would justify injunctive relief
23 against the private party.

24 One other point. As recently as March the 21st the
25 Supreme Court issued the Sackett decision. In that decision

1 they were fighting over a puddle, and Sackett said this isn't
2 jurisdictional and the government issued them an order saying
3 you can't fill these wetlands, and the Court, the Supreme
4 Court once again endorsed that the proper vehicle for
5 challenging what a party believes to be arbitrary, capricious,
6 or conduct not in accordance with law by an agency is the APA,
7 and that's Sackett v. EPA. I only have the slip opinion, but
8 it's number 10-1062.

9 THE COURT: That isn't the Southern District of Ohio
10 case?

11 MR. ADDISON: No, this is the U.S. Supreme Court
12 case.

13 THE COURT: Which is the Southern District of Ohio
14 case?

15 MR. ADDISON: Sir?

16 THE COURT: Which is the Southern District of Ohio
17 case?

18 MR. ADDISON: The Southern District of Ohio, Western
19 Division, is the Sayler Park Village case, which is at a
20 Westlaw site, Your Honor, 2003 Westlaw 22423202. And then
21 the Sackett decision, the completion of that was it's case
22 number 10-1062 decided March 21st.

23 THE COURT: Okay.

24 MR. ADDISON: And so we do have a cause of action.

25 Now, we admit the issue of navigability is a

1 complicated one that has cross-currents, so to speak, going
2 every direction. And here's where we see it come out just so
3 I want to be sure the Court is clear of our position.

4 Number one, the first two miles upstream from Lake
5 Superior have been admitted to be navigable. That's number
6 one.

7 Number two, are there other areas further upstream
8 that are navigable? And that's where the evidence we've put
9 forward to the Court particularly concerning commercial or
10 recreational craft putting in at the Dodge City Road 550 point
11 is one of the indicators of navigability. So we argue, we
12 argue it's navigable all the way to the headwaters because
13 they have to be protected under this phrase "other waters" in
14 Section 403. But if it doesn't extend that far, how far it
15 extends is important because if they affect a water of the
16 U.S. -- I'm sorry, if they affect a navigable water, its
17 capacity, its course, or its location, that's a violation.
18 That's actionable.

19 So even though Mr. Brockman -- I'm sorry, Mr.
20 Brockman, Mr. Workman, Kennecott's expert, testifies water
21 that starts up in the headwaters eventually ends up in Lake
22 Superior, once again this is Mr. Workman, their expert, Page
23 5675-5676 of the hearing transcript, he acknowledges the
24 waters that start there will end up in Lake Superior. Now, so
25 where that navigability ends is of importance because it could

1 play a factor in whether or not a navigable water is affected.
2 However, all we have to demonstrate here is whether or not
3 that water has been affected, and frankly, Your Honor, when
4 they drain the headwaters and they change the flow, the
5 capacity and the condition are affected. That is a violation
6 without a permit no matter what else they do.

7 Now, they're not just affecting it that way, but
8 they're affecting it by adding this other water. No evidence
9 of when, how much, how often, or its impact on species, the
10 river itself. So we argue that's a violation.

11 Next point, Judge -- Your Honor, and with all due
12 respect, everyone who participated throughout these state
13 proceedings, while the facts adduced in those proceedings are
14 relevant, the decisions that were made are not. And the
15 reason why is that that is not a federal proceeding under the
16 Clean Water Act, the Rivers and Harbors Act, NEPA, the
17 Endangered Species Act. There is no jurisdiction in state
18 court to determine those issues. If they were evaluated in
19 any other context than the federal statute and the federal
20 court's jurisdiction, they have no impact as far as the
21 decision.

22 It's not collateral estoppel because we didn't
23 litigate the issue. We didn't litigate violation of the
24 Endangered Species Act. They litigated something having to do
25 with a mining permit and endangered species. To determine

1 based on the rulings in the state court decision that there
2 are no impacts and the like would be to usurp our cause of
3 action in federal court, and that is inappropriate and should
4 not be done.

5 Now, everybody's criticizing us because they're
6 saying we're extreme and radical and the like in how we've
7 determined jurisdiction. And first off, as we discussed
8 earlier for the RHA, you've got this kind of scenario. I
9 apologize for the crude drawing. You theoretically have an
10 ordinary high water mark here. You have an ordinary high
11 water mark here. This is the Salmon Trout River.
12 Theoretically this is the mine, and all that distance is
13 between here.

14 Under the RHA, it specifically says in the Corps'
15 reg that they declined to follow that everything including the
16 bed, the water, and all the land below it is jurisdictional
17 vertically. It may be different horizontally with respect to
18 this navigability, but for purposes of vertical jurisdiction,
19 and this is where this comment came in our brief, RHA is
20 coextensive with the Clean Water Act. That's how it's phrased
21 here.

22 Now, one other point. There was some discussion of
23 exactly where the mine ore is located in connection with the
24 Salmon Trout River, and I've got a visual of it that I may be
25 able to find, Your Honor, I do, and can put it up on the Elmo,

1 and when it warms up, we'll come back to it. But the point I
2 want to make, Your Honor, is that according to the drawing
3 produced by Kennecott Eagle Minerals which is now up on our
4 screen, we have the Salmon Trout River and its wetlands, and
5 you'll see down below they are in blue, and we have the ore
6 body which is that red circle. The ore body is under --
7 partially under the Salmon Trout River according to this and
8 totally under the wetlands associated with it, which are the
9 headwaters for the Salmon Trout River, and that's important
10 because it actually is under those waters if the Court finds
11 they're navigable.

12 Now, I mentioned the jurisdiction under the RHA, and
13 that's in the regulation we had referred the Court to earlier,
14 and it's really not any different under the Clean Water Act.
15 And the reason for that is with the same drawing, ordinary
16 high water mark, ordinary high water mark, the Clean Water Act
17 vertical jurisdiction says the Corps has jurisdiction on
18 everything under the ordinary high water mark. It does not
19 address the land below it. It just says that.

20 However, there are other reasons why there's
21 jurisdiction down that far under the Clean Water Act, and
22 they're twofold. One is interstate commerce is going on down
23 here, and jurisdiction under the Clean Water Act follows
24 interstate commerce. Number two, they've admitted what
25 they're doing down here is going to affect these wetlands up

1 here and this water of the U.S. by the drawdown.

2 In addition to that, 1344 says specifically: "Any
3 discharge of dredged or fill material into the navigable
4 waters incidental to any activity having as its purpose
5 bringing an area of the waters into a use to which it has not
6 been previously subject, where the flow or circulation of
7 navigable waters may be impaired or the reach of such waters
8 be reduced, shall be required to have a permit." Now, these
9 folks on the other side say, There's no dredging going on
10 here. There's no filling going on down here, and even if it
11 is, it doesn't matter.

12 Well, not right. Under their regs, the water of the
13 U.S. extends down here. When they're engaged in activity down
14 here, under their own regs, that is the defined -- that area
15 below the water, it's defined to be a water of the U.S. So
16 when they excavate -- and by the way, on the Corps' Web site
17 they have a bunch of educational materials, and one of them is
18 on dredging. And in defining dredging, the very first thing
19 they say, second paragraph, "Underwater excavation is called
20 dredging."

21 Let's talk about dredging a second because filling
22 is easy. They've admitted they're building these stopes.
23 They've admitted they're putting that material back in here,
24 which is fill. If this is a water of the U.S., they are
25 filling it.

1 Here's the deal on dredging. Conventional dredging,
2 of course, Your Honor, everybody's familiar with it. You've
3 got a waterbody -- whoops. We're going to look at it
4 horizontally. We've got a waterbody here, and if you want to
5 have a canal, if you want to have a route to an oil well
6 offsite, you normally go in and you dredge up here at the bed,
7 at the surface, and you normally enter that way. But that
8 does not mean that dredging isn't underwater excavation that
9 starts here and goes up. That's also dredging. Now, why is
10 that also dredging? Because dredging is underwater
11 excavation, and we are under the water.

12 Another example. Suppose we got the Big Dig in
13 Boston, something else like that, and they go down and they go
14 down and they go down. All of that's jurisdictional. And
15 it's not just because they're going down. It's because
16 they're in a water of the U.S. Well, when they dredge and
17 pull all this stuff out, and this is defined by their own regs
18 to be a water of the U.S., that's dredging. When they stick
19 their stopes back in, that is the redeposit of dredge fill, of
20 dredged fill.

21 It also includes a, quote, "addition of pollutants"
22 because in their materials they say that these rocks that are
23 going to make up most of the stope aren't properly solidified,
24 so they have to add concrete, they have to add lime, Portland
25 cement to it to make it an effective stope. And so

1 everybody's talking about how unreasonable and wild our suit
2 is and how we define things. We define them how the Corps
3 wrote them. They're not following their regs. They have a
4 duty to follow their regs.

5 Now, the rubber does meet the road on navigability.
6 But what we're going to find is under the Rivers and Harbors
7 Act, because the water gets all the way to Lake Superior, that
8 it is affected by this drawdown and by the contribution of
9 water they plan to make that they don't even define. There's
10 no evidence that gets perfectly offset. There's no evidence
11 those two activities don't change the capacity and the
12 condition of the part of the river that is navigable, and
13 we've demonstrated that does.

14 Now, in addition to that, Judge, they wave off
15 everything as de minimis, and maybe it's 60 gallons per
16 minute, and in the winter it is. Who knows? I don't. We
17 don't have to show that. We only have to show it affects it.
18 When they don't study what happens with 210 gallons or some
19 larger amount, we don't know the answer. Their own experts
20 say that's a possibility. They had to look at it.

21 The more they draw down, the greater the effect, and
22 they don't look at the potential effects. What we do know is
23 they admit that even at 60 gallons per minute, it's going to
24 diminish the flow in the Salmon Trout River by 3.3 percent.
25 The notion, by the way, that there is some Saint Salmon River

1 perched over the river that's going to add that contribution
2 they removed back in is just inaccurate. Whatever is
3 occurring downstream is occurring downstream whether they pull
4 the water out or not unless it affects it so much that it
5 changes it, which proves our point.

6 But the notion that it all gets mixed really doesn't
7 make any sense because if you remove it from the headwaters,
8 it affects the entire river by definition. Has to. The fact
9 that they do something here or there can be debated, should be
10 studied as a part of the permit process, but it doesn't
11 diminish the fact that their conduct is affecting a water, a
12 navigable water, whatever part of that river is navigable. We
13 say it extends all the way to the headwaters if not to Dodge
14 City, I guess if not to the two-mile point.

15 When you look at the Corps' regs, they clearly
16 contemplate that at the end of these rivers are marshlands as
17 they say in their reg. There are marshlands and other bodies
18 that do not -- that are not technically navigable, but we're
19 going to determine they're navigable by law because we have to
20 protect them, and that's our position. If we're wrong, then
21 we can be told. But when you look at the regs, this all falls
22 within them.

23 A couple of times our opponents suggested that we
24 are telling Kennecott to go get a permit. We are not telling
25 anybody to get a permit. We are saying that the Corps has to

1 administer the permit program that they have a mandatory duty
2 to administer.

3 What happens within that program is in the
4 discretion of the Corps, whether they grant the permit,
5 whether they issue the permit. But it is clear from the
6 regulations they have to administer that program. If they
7 didn't have that mandatory -- Congress gave them that
8 mandatory duty, and if they didn't have it, we would have no
9 one -- we would have no permitting program because it would be
10 discretionary.

11 And I might add also a number of these cases suggest
12 that that mandatory duty should be determined in light of the
13 Act's purpose to protect the biological diversity and the like
14 of waters of the U.S. around the country. And so we would
15 suggest to the Court with respect to that that they have the
16 mandatory duty.

17 Once again, and I think the Court has heard this,
18 but I just have got to raise it once more, this is a no-permit
19 case. That's really different from a permit case. You know,
20 if they had gone through the process, we would be here
21 claiming, if it were true, that they failed in that process.
22 But they didn't go through it. And so the balancing of the
23 harms in all these no-permit cases is very different from that
24 described by my opponents. And the reason why is when you
25 jump the gun and you work without a permit that's required,

1 then it's your burden. That's self-inflicted harm. We don't
2 have to bond it and we don't have to balance it because it's
3 their harm.

4 A lot has been said about laches, and I do want to
5 mention the Sixth Circuit case again, Environmental Defense
6 Fund v. Tennessee Valley Authority, 468 F.2d 1164 at 1182, a
7 1972 case. This has been the law in the Sixth Circuit on
8 laches. "Consideration of the public interest also requires
9 us to reject the defense of laches. The strong policy
10 embodied in NEPA concerning the importance of agency
11 consideration of environmental values militates against
12 barring this suit on the ground of unreasonable delay."

13 It then cites the Volpe decision, 458 F.2d at
14 1329-1330. That's 458 F.2d at 1329-1330, "although the delay
15 undoubtedly will affect the ultimate decision whether to
16 proceed with the project as planned. There is also the public
17 interest in requiring public officials to obey statutory
18 mandates: 'The tardiness of the parties in raising the issue
19 cannot excuse compliance with NEPA; primary responsibility
20 under the Act rests with the agency,'" citing City of New York
21 v. U.S. The Sixth Circuit went on to say: "These
22 considerations may in part explain why courts have not been
23 receptive to foreclosing litigation on the issues raised in
24 this appeal on the ground of plaintiffs' delay in bringing
25 suit."

1 As I mentioned, Your Honor, we may be late, but
2 everyone else is later. We don't have the duty to get a
3 permit. We don't have a duty to administer a program. And we
4 will find that our case is not subject to the doctrine of
5 laches, the statute of limitations, because once again, they
6 violate the law every day.

7 The public interest. Counsel for the government
8 mentioned the public interest also has an interest in
9 following statutes, and we certainly agree with that and we're
10 encouraging the government to follow it here. And it also has
11 an interest in following the regs as outlined, and that public
12 interest favors Huron Mountain Club rather than defeats it.

13 Oh, one other point and then I'll close, Your
14 Honor. The other side didn't spend much time talking about
15 endangered species, but an APA claim raising the Endangered
16 Species Act, like the Rivers and Harbors Act, like the Clean
17 Water Act, is a valid claim. And regardless of the state
18 court's finding about endangered species, there has never been
19 the proper mandatory required procedural consultation,
20 biological assessment, and ultimately biological opinion
21 because of the numerous endangered species that Kennecott's
22 witnesses admit are on the site.

23 And in connection with that, the investigation under
24 NEPA has to apply to the affected area. Not to the plant
25 site, not to some pretextual area that's been determined based

1 on anything other than how these species are affected. That
2 study has also never been performed.

3 So in closing, it is Huron Mountain Club's position,
4 Your Honor, that our APA claim is perfectly valid and
5 legitimate. It can be brought, goodness knows, without a
6 private right of action under NEPA or under the RHA. It can
7 be brought even though there's a citizen suit provision under
8 the Clean Water Act.

9 Part of the Salmon Trout River at the least is
10 navigable. That portion that is navigable, whether it's the
11 entire reach or whether it's a portion of that reach or
12 whether it's two miles, is being affected by the structure
13 that's being built by Kennecott. It doesn't matter if it's 20
14 feet away or 22 miles away. If their structure is affecting
15 that water, that's a violation. The Corps had a duty to
16 either authorize or prohibit that structure in that location
17 if it's going to affect it.

18 If this Court finds that -- oh, and one other
19 point. Once again, Judge, under 1344, this delegation to the
20 state is not of the entire river. It's not of the entire
21 Salmon Trout River. It only extends to those portions that
22 are not navigable waters. And the exact language of that
23 under 1344 is found in Paragraph (g) where it says: "The
24 Governor of any State desiring to administer its own
25 individual and general permit program for the discharge of

1 dredged or fill material into the navigable waters (other than
2 those waters which are presently used, or are susceptible to
3 use in their natural condition or by reasonable improvement as
4 a means to transport interstate or foreign commerce shoreward
5 to their ordinary high water mark, including all waters which
6 are subject to the ebb and flow of the tide shoreward to their
7 mean high water mark, or mean higher high water mark on the
8 west coast, including wetlands adjacent thereto.)"

9 So depending upon this Court's determination of
10 navigability, this entire stream may not be under -- it is
11 not, the two miles definitely are not under the jurisdiction
12 of the State of Michigan, and to the extent navigability
13 extends upstream, neither are those portions. That does
14 affect our Clean Water Act claim, Your Honor. We acknowledge
15 that. If the waters of the U.S. that are navigable do not
16 extend all the way to the headwaters, then those headwaters
17 have been delegated to the state. But once again, under
18 Section 403 of the Rivers and Harbors Act, it prohibits the
19 building of these structures in a water in a navigable river
20 or other water of the United States. The other water -- the
21 most important other water of the United States that that
22 could be are headwaters because the tampering with them
23 affects the entire river.

24 If there are no further questions, thank you, Your
25 Honor.

1 THE COURT: Thank you. Thank you. I will get to
2 this matter as soon as I am able to and you will hear from
3 me.

4 If as you return to your respective offices or are
5 trying to get to sleep tonight and a great idea strikes you
6 and you realize you didn't put it forth originally, probably
7 in the next five days or so you can brief me on it if
8 something comes to you all of a sudden, which it always did to
9 me when I was in trial practice. My best thoughts came the
10 night afterward. If that occurs, just send them to me and
11 I'll take those up with the rest of this.

12 Thank you. Thank you, all of you.

13 (Proceedings concluded at 4:20 p.m.)
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CERTIFICATE OF REPORTER

I, Kevin W. Gaugier, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript was prepared by me.

/s/ Kevin W. Gaugier

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